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THE TRIAL OF MUNGO CAMPBELL,

For the MURDER of

ALEXANDER Earl of EGLINTOUN.

THE

TRIAL

OF

MUNGO CAMPBELL,

BEFORE THE

HIGH COURT of JUSTICIARY in Scotland,

For the MURDER of

ALEXANDER Earl of EGLINTOUN.

From an authentick COPY, extracted from the Records of the Court.

LONDON:

Printed for D. WILSON and G. NICOL, in the Strand; and ROBINSON and ROBERTS, in Pater-noſter-Row.

MDCCLXX.

1770

THE

TRIAL

OF

MUNGO CAMPBELL,

For the MURDER of

ALEXANDER Earl of EGLINTOUN.

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh decimo octavo die menſis Decembris milleſimo ſeptingenteſimo ſexageſimo nono, per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer at Saltcoats in the county of Air, and preſent priſoner in the Tolbooth of Edinburgh, Pannel,

Indicted and accuſed at the inſtance of Archibald earl of Eglintoun, brother-german to the deceaſed Alexander earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, Eſq. his Majeſty's Advocate for his

Majeſty's intereſt, for the crime of murder, in manner mentioned in the criminal indictment raiſed againſt him thereanent, bearing,

THAT where, by the law of God, and the laws of this and every other well governed realm, MURDER, or the feloniouſly bereaving any of his Majeſty's ſubjects of their lives, is a moſt atrocious crime, and ſeverely puniſhable; YET TRUE IT IS, and of verity, that you, the ſaid Mungo Campbell, have preſumed to commit, and are guilty, actor, or art and part of the ſaid crime; IN SO FAR AS the deceaſed Alexander earl of Eglintoun having, upon the twenty-fourth day of October, in this preſent year one thouſand ſeven hundred and ſixty-nine, or upon one or other of the days of that month, or of the month of September preceding, or November following, gone out from his houſe of Eglintoun, in the county of Air, in his coach, to look at ſome of his grounds, and being told by one of his ſervants, when upon the road from Saltcoats to Southennan, within the pariſh of Ardroſſan, and ſaid county of Air, that he obſerved two perſons, one of them with a gun, at a ſmall diſtance, upon his lordſhip's ground of Ardroſſan, the ſaid deceaſed earl (who, by an advertiſement in the news-papers, had forbid all unqualified perſons to kill game within his eſtate) came out of his coach, unarmed, and mounted a horſe which was led by his ſervant, and, leaving in his coach an unloaded gun, he rode towards the two perſons, who, in the mean time, went off the earl's grounds of Ardroſſan into the adjacent ſands, and he having come near to the two perſons on the ſaid ſands, and diſcovering the one with the gun to be you, the ſaid Mungo Campbell, he accoſted you, by ſaying, Mr. Campbell, I did not expect to have found you ſo ſoon upon my grounds, after the promiſe you made me when I laſt catched you, when you had ſhot a hare; and the earl having thereupon deſired you to deliver your gun to him, you refuſed ſo to do; and, upon the earl's approaching towards you, you cocked your gun, and preſented or pointed it at him: and upon the earl's then ſaying, Sir, will you ſhoot me? you anſwered, that you would, if his lordſhip did not keep off; to which the earl replied, that if he had his gun he could ſhoot pretty well too, or uſed words to that import; and deſired his ſervant to bring his gun from his coach, which was then at ſome diſtance; and the earl having diſmounted, and walked towards you, leading his horſe in his hand (without arms or offenſive weapons of any kind) you retired, or ſtept backwards, as he approached, and continued

tinued to point your gun at him, desiring his lordship again to keep off, or, by God, you would shoot him: and a servant, near to the earl, having begged of you, for God's sake, to deliver your gun, you again refused, saying, you had a right to carry a gun; to which lord Eglintoun answered, that you might have a right to carry a gun, but not upon his estate without his liberty; but you still persisted in refusing to deliver your gun; and by striking your foot against a small stone, having fallen upon your back when retiring and keeping your gun pointed at lord Eglintoun, as above described, the muzzle of the gun came thereby to be altered in the direction from lord Eglintoun, and to be pointed near straight upwards; and lord Eglintoun, who was only distant from you two or three yards, having stopped or stood still upon your falling, you, as soon as you could, recovered yourself, and, resting upon your arm or elbow, aimed or pointed your gun to the said Alexander earl of Eglintoun, and wickedly and feloniously fired it at him, then standing unarmed, smiling at your accidental fall, and by the shot he was wounded in the belly in a dreadful manner, the whole lead-shot in the gun having been thrown into his bowels, of which wound the said Alexander earl of Eglintoun died that night about twelve o'clock. And you the said Mungo Campbell, after perpetrating so cruel, wicked, and barbarous a crime, did immediately run to one of lord Eglintoun's servants who had brought his gun from his coach, and who was standing at some distance, and endeavoured to wrest the gun from him, but was prevented by the assistance of another servant; and when the two servants were engaged with you defending the gun, and endeavouring to secure you, the earl, who was then sitting on the ground, called to the servants to "secure the "man, for he had shot him, but not to use him ill," or used words to that purpose and effect; and upon your being brought near to lord Eglintoun, he said to yourself, "Camp-"bell, I would not have shot you." And you, the said Mungo Campbell, when carrying from the place where you committed the foresaid crime, to Saltcoats and Irvine, did acknowledge to sundry persons, that you had wilfully and intentionally shot the said Alexander earl of Eglintoun: AND the said Alexander earl of Eglintoun, when within two or three hours of his death, in giving an account to John Moor, surgeon in Glasgow, who was called to give what assistance he could in the way of his profession, of what had passed between you and him, did in substance say, that you, the said Mungo Campbell, did take an aim at him, and shot him wilfully, and which account of the matter was given by the said Alexander earl of Eglintoun with the greatest

Majeſty's intereſt, for the crime of murder, in manner mentioned in the criminal indictment raiſed againſt him thereanent, bearing,

THAT where, by the law of God, and the laws of this and every other well governed realm, MURDER, or the felonioufly bereaving any of his Majeſty's ſubjects of their lives, is a moſt atrocious crime, and ſeverely puniſhable; YET TRUE IT IS, and of verity, that you, the ſaid Mungo Campbell, have preſumed to commit, and are guilty, actor, or art and part of the ſaid crime; IN SO FAR AS the deceaſed Alexander earl of Eglintoun having, upon the twenty-fourth day of October, in this preſent year one thouſand ſeven hundred and ſixty-nine, or upon one or other of the days of that month, or of the month of September preceding, or November following, gone out from his houſe of Eglintoun, in the county of Air, in his coach, to look at ſome of his grounds, and being told by one of his ſervants, when upon the road from Saltcoats to Southennan, within the pariſh of Ardroſſan, and ſaid county of Air, that he obſerved two perſons, one of them with a gun, at a ſmall diſtance, upon his lordſhip's ground of Ardroſſan, the ſaid deceaſed earl (who, by an advertiſement in the news-papers, had forbid all unqualified perſons to kill game within his eſtate) came out of his coach, unarmed, and mounted a horſe which was led by his ſervant, and, leaving in his coach an unloaded gun, he rode towards the two perſons, who, in the mean time, went off the earl's grounds of Ardroſſan into the adjacent ſands, and he having come near to the two perſons on the ſaid ſands, and diſcovering the one with the gun to be you, the ſaid Mungo Campbell, he accoſted you, by ſaying, Mr. Campbell, I did not expect to have found you ſo ſoon upon my grounds, after the promiſe you made me when I laſt catched you, when you had ſhot a hare; and the earl having thereupon deſired you to deliver your gun to him, you refuſed ſo to do; and, upon the earl's approaching towards you, you cocked your gun, and preſented or pointed it at him: and upon the earl's then ſaying, Sir, will you ſhoot me? you anſwered, that you would, if his lordſhip did not keep off; to which the earl replied, that if he had his gun he could ſhoot pretty well too, or uſed words to that import; and deſired his ſervant to bring his gun from his coach, which was then at ſome diſtance; and the earl having diſmounted, and walked towards you, leading his horſe in his hand (without arms or offenſive weapons of any kind) you retired, or ſtept backwards, as he approached, and continued

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calmneſs and compoſure; and you, the ſaid Mungo Campbell, having been brought before Charles Hamilton of Craighlaw, Eſquire, a juſtice of peace of the county of Air, upon the ſaid twenty-fourth day of October one thouſand ſeven hundred and ſixty-nine; and thereafter before William Duff, Eſquire, Sheriff Depute of the county of Air, upon the twenty-ſeventh day of the ſaid month of October, you did voluntarily emit two declarations, which were ſubſcribed by you, and will be uſed in evidence againſt you upon your trial: and, for that purpoſe, both declarations ſhall be lodged in the hands of the clerk of the court of juſticiary, before which you are to be tried, that you may ſee the ſame: AT LEAST, at the time and place above deſcribed, the ſaid Alexander earl of Eglintoun was felonioufly murdered, or bereaved of his life, by a wound he received from the ſhot of a gun, and of which wound he died in about twelve hours, or ſome ſhort ſpace thereafter; and you, the ſaid Mungo Campbell, was actor, or art and part of the ſaid murder. ALL WHICH, or part thereof, being found proven by the verdict of an aſſize, before the lord juſtice general, juſtice clerk, and commiſſioners of juſticiary, you ought to be puniſhed with the pains of law, to the terror of others to commit the like in time coming.

JA. MONTGOMERY.

After reading the indictment, the court obſerved, That the indictment ſets forth, that the deceaſed earl received the ſhot of which he died upon the ſands adjacent to the grounds of Ardroſſan; and deſired the counſel for the proſecutors to explain if they meant the deceaſed earl received his wound upon the ſands of the ſea, and within the flood-mark.

The lord-advocate admits that the deceaſed earl received the ſhot of which he died upon the ſands of the ſea, and within the flood-mark.

(Signed) JA. MONTGOMERY.

The court thereupon deſired to hear counſel on both ſides upon this preliminary queſtion, Whether or not the court has juriſdiction to try this indictment in the firſt inſtance?

Pro-

Procurators for the Profecutors.	*Procurators for the Pannel.*
James Montgomery, Eſq. his Majeſty's advocate,	Mr. John Dalrymple, adv.
Mr. Henry Dundas, his Majeſty's ſolicitor,	Mr. David Rae, adv.
Mr. Alexander Lockhart, adv.	Mr. John M'Laurin, adv.
Mr. Robert M'Queen, adv.	Mr Robert Cullen, adv.
Mr. Ilay Campbell, adv.	
Mr. Alexander Wright, adv.	
Mr. Andrew Croſbie, adv.	
Mr. Alexander Gordon, adv.	
Mr. Walter Campbell, adv.	
Mr. Alexander Ferguſon, adv.	

Parties procurators being heard at great length upon the ſaid preliminary queſtion, the lord-juſtice, clerk, and lords commiſſioners of juſticiary ſuperſede adviſing the debate till Friday next the twenty-ſecond inſtant, at three o'clock in the afternoon in this place; appoint parties procurators to make up minutes thereof, betwixt this and Thurſday next at twelve o'clock at noon, to be ingroſſed in the record; continue the diet againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till the ſaid twenty-ſecond inſtant, at the hour above-mentioned; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the mean time to be carried back to priſon.

Mr. David Rae for the pannel repreſented, That this court has here no juriſdiction, at leaſt in the firſt inſtance, but that the ſame does belong to the high court of admiralty. In the infancy of all ſtates and governments juriſdiction has been but imperfectly ſettled, and its conſtitution has only ripened by degrees; but from the earlieſt times, and indeed from the very nature of the thing, it has been territorial. The firſt judges were probably appointed for trying cauſes of all kinds, but were certainly circumſcribed to a territory, as their authority could reach no further than the bounds of that power from which ſuch authority was derived. Afterwards as nations came to be more civiliſed, and ſyſtems of laws and governments to be formed, it was found convenient to diſtribute juriſdiction among different hands, under the ſame head or government. Hence has ariſen the diſtinction between civil and criminal courts, and between many others that now obtain in different countries; but to all of theſe

has

has ſtill been aſſigned a particular territory, within or over which ſuch ſpecies of juriſdiction may be exerciſed, and not beyond it. The feudal laws and uſages which have been received to a great degree in the country do more eſpecially limit juriſdiction to particular territories, as witneſs the juriſdiction of the barons, of lords of regality, of ſheriffs, &c. Diſtinct from theſe, though eſtabliſhed on the ſame principles, has been the juriſdiction of admiral, or courts of admiralty. While commerce and maritime affairs were little attended to, the eſtabliſhment of ſuch a juriſdiction might be overlooked; but when theſe matters began to be of more importance, it ſeems to have occurred to the government of every European ſtate bordering on the ſea, that a ſeparate juriſdiction ſhould be eſtabliſhed for the cognizance of ſuch affairs as either eſpecially related thereto, or as occurred either upon the ſea or ſhores thereof. Hence the high admiral was eſtabliſhed in France many centuries ago, with a very ample juriſdiction; and upon the ſame footing ſuch an officer, with equivalent powers, was very early eſtabliſhed in Scotland. What was the preciſe æra of that eſtabliſhment does not with certainty appear, but it is proved by our ſtatutes that it happened before the reign of James V. and that beſides the cognizance of civil cauſes of a maritime nature, the high admiral of Scotland was veſted with a criminal juriſdiction within a certain territory, that is to ſay, he was appointed the king's juſtice-general, not only upon the high ſeas, but alſo in ports and harbours, and in rivers below the firſt bridges, and on the ſea-ſhores as far as the higheſt tide flows, or below the flood-mark, whereby he had undoubted right to cognoce and try all crimes committed within theſe bounds, as much as the juſtice-court or high court of juſticiary had to try crimes committed in the internal part of the kingdom. That ſuch a juriſdiction and territory was and is veſted in the admiral cannot be denied, and appears not only from the act 1681, to be afterwards mentioned, but from many authorities long prior to that ſtatute, more particularly Welwood, in his Abridgment of the Sea-laws, does, in chap. 2d of his treatiſe, lay it down as then law, that the admiral of Scotland had the ſole criminal juriſdiction within the aforeſaid territory, and particularly mentions his right to try "ſhedders of other men's "blood on ſea or any port or river below the firſt bridge, "&c." Sir Thomas Craig, lib. iii. tit. 7. § 10. has theſe words, "poſtquam vero in mari dominari cœperunt, admi-"ralii officium introductum eſt cujus de rebus ſivi delictis "in mari aut in littere, aut etiam portu geſtis aut commiſſis

" miſis juridiſtio erat." Sir George Mackenzie likewiſe, in his Treatiſe on the Criminal Law, publiſhed before the act 1681, in his title of the admiral's jnriſdiction, does expreſsly ſay, " That the lord high admiral and his deputies are, by " the laws of all nations, judges competent to all crimes " committed on ſea; and by an unprinted ſtatute with us, " the admiral is competent in all controverſies, actions, " and quarrels concerning crimes, faults, and treſpaſſes " upon ſea, *or ſo far as the ſame flows and ebbs:*" and he quotes not only the authority of Welwood, but of Preſident Balfour in his Practicks, title *Admiral*, and of another Scotſman named King, who wrote upon this ſubject. Theſe authorities ſhow, that at leaſt two centuries ago, the admiral's juriſdiction in crimes was with us extended to the flood-mark; and what clears and compleats the evidence on this head is the 16th act, 1681, paſſed in the third parliament of king Charles II. which ſtatutes and declares, " That " the ſaid high-admiral, as he is his majeſty's lieutenant and " juſtice-general upon the ſeas, and in all ports, harbours, " and creeks of the ſame, and upon freſh waters or na- " vigable rivers below the firſt bridges, *or within the flood-* " *marks, ſo far as the ſame does or can at any time extend*; " So the ſaid high admiral hath the ſole privilèdge and ju- " riſdiction in all maritime and ſea-faring cauſes, foreign " and domeſtick, whether civil or criminal, whatſoever, " within this realm, and over all perſons as they are " concerned in the ſame; and prohibits and diſcharges all " other judges to meddle with the deciſion of any of the " ſaid cauſes in the firſt inſtance, except the great admiral " and his deputes allenarly." And this ample juriſdiction appears from the records of the admiralty court to have been exerciſed for ages paſt, without challenge, under the eye of this and the other ſupreme courts of the country. Crimes of every kind, and particularly murder and manſlaughter, committed within the admiral's territory, have been openly tried by him; and his ſentences, as well capital as others, duly put in execution. And as by the ſame ſtatute 1681, as well as by former ſtatutes, this court of admiralty is expreſsly declared " to be a ſovereign judi- " cature in itſelf, and of its own nature to import ſum- " mary execution;" ſo it was a doubt whether its decrees in criminal matters, were even ſubject to the review of this high court of juſticiary, till the caſe of *Long* and *Macadam*, in the year 1735, when this court received the ſentence of the admiral, in a criminal cauſe, as flowing from the ſame principles upon which the court of ſeſſion

are

are by the ſaid act 1681, impowered to review his proceedings in civil cauſes. But down to this day no lawyer ever doubted that the court of admiralty ſtood veſted with a competent juriſdiction to try crimes committed within his territory, or within the flood-mark, in the firſt inſtance. And with regard to the nature of that juriſdiction, or whether the ſame is privative or excluſive of other judges, in the firſt inſtance, or if it is only cumulative with the juriſdiction of their courts, the point is no leſs clearly eſtabliſhed, that the admiral's juriſdiction is privative, both by principles and authorities.

Juriſdiction aſſigned within a territory does of its nature import that it is privative or excluſive in the firſt inſtance, as otherwiſe there could be no uſe or meaning in aſſigning a territory, and inextricable confuſion would follow. Hence the juriſdiction of lords of regality, &c. was always privative within their bounds ſo much, that they held, and for many ages exerciſed a power of re-pleading criminals even from this court; and where there are different courts competent to the ſame kind of cauſes, there is no example of the one's incroaching upon the territory of the other, *in the firſt inſtance*, without a ſpecial grant from the crown, or ſtatute, to that effect; none of which occur in the preſent caſe. The nature of the admiral's juriſdiction in this reſpect may alſo be illuſtrated from that of the admiralty of France, from which it has in all probability been copied by the kings of Scotland, when in great correſpondence with that country. Cléariack, in his treatiſe intitled *Us & Couſtumes de la Mer*, a book of great authority, and which was publiſhed in the laſt century, does, in treating of the juriſdiction of the marine in art. 39, p. 459, lay it down as a rule, that to the admiral and his officers belongs the cognizance, juriſdiction, and deciſion of all crimes, delicts, and malafices "Survenant ſur mer & pas "les greves d'icelle, *laquelle* connoigſance eſt interdité a "tous autres juges:" and in confirmation of this, he refers to the ordonances of the French kings in 1543, 1584, &c. Here it will be obſerved, that the cognizance of crimes falling within the admiral's juriſdiction is expreſly interdicted and forbid to all other judges: and the ſame author, in page 422, holds it as a rule that the place where a crime has been committed, ſubjects the delinquent to the juriſdiction of that place, which is exactly conformable to our opinion of criminal juriſdiction. In the like manner *Welwood*, in the paſſages already referred to, after mentioning the admiral's juriſdiction in cauſes civil and criminal, adds,

"That no other judge of any degree, at leaſt in Scot-
"land, may meddle therewith, but only by way of aſſiſt-
"ance; and that by commiſſion and in difficile cauſes, as
"was found in the action intented by Antoine de la Tour,
"and one Chriſtian Marteis, 6th Nov. anno 1542:" and for proof thereof, he refers to the records of Scotland, tom. ii. c. 555. Further, the great ordonance of Lewis XIV. of France, concerning the marine, contains a particular chapter on the competency of the judges of the admiralty, and which begins with theſe words, "Les juges de l'admirauté
"connoitront *privativement* a tous autres, &c." And then goes on to enumerate the cauſes in which the admiral ſhould have a privative juriſdiction; and, *inter alia*, the article 10th is in theſe words, "Connoiſtront, pareillement des pira-
"teries & des pillages & deſertions des equipages, & generale-
"ment de tous crimes & delits commis ſur la mer; ſes ports
"Havres & Rivages." This ordonance bears date the 24th of Auguſt, 1681, and immediately thereafter followed our ſtatute above-mentioned, paſſed in September 1681, which, though ſhorter, does evidently proceed on the ſame plan, and declares, the admiral court to be a ſovereign court; the admiral to be the king's lieutenant and juſtice general upon the ſeas, &c. and to have the ſole privilege and juriſdiction in all maritime or ſea-faring cauſes, whether civil or criminal, and prohibits all other judges to meddle therewith in the firſt inſtance. Theſe words of the ſtatute, therefore, cannot leave a doubt, that in all crimes committed within the admiral's territory, his juriſdiction was intended to be privative and excluſive; and accordingly lord Stair, in his Inſtitute, book iv. tit. 37. § 4. does expreſly ſay, "That all actions criminal, committed at ſea, or within the
"ſea-mark, are *proper* to be judged by the high-admiral
"of Scotland:" and it is clear, that by the word *proper* he means, that the juriſdiction is privative or excluſive, as he is there deſcribing the proper or privative juriſdiction of courts of different kinds. It is true, that Sir George Mackenzie does ſay, that the juſtices, or juſticiary court, has a cumulative juriſdiction with the admiral in crimes committed at ſea; but it will be noticed, that he wrote before the act 1681: and a late learned judge of this court, in manuſcript notes upon Mackenzie, has obſerved, "that the mat-
"ter was now clear by the act 1681, and that in the caſe
"of and others
"1723, the lords were of opinion, that the judge-admiral
"had a privative juriſdiction in prima inſtantia;" but the diet was deſerted ante ſententiam. The caſe here referred

to, appears from the records of the court, to have been that of Thomas Lamb, who was indicted on the 13th of December, 1723, for deforcing cuſtom-houſe officers, and violently entering a ſhip in a harbour; but who having objected that the crime could only be tried by the admiral, the king's advocate thereupon deſerted the diet; and the ſame manuſcript notes contain an opinion, "that as the ſeſſion may reduce the admiral's decreets *incivilibus*, ever "ſince the act *a paritate*, the juſtices may reduce in *criminalibus* and their (i. e. admiral's) *privative juriſdiction* is "only declared (in the firſt inſtance) therefore their proceedings may be reviewed;" which ſhows that this court's having a power to review the admiral's proceedings, does not at all impeach his having a privative juriſdiction for trying crimes in the firſt inſtance that have been committed within his territories. In ſhort, Sir George Mackenzie appears to have formed his opinion not upon principles or ſtatutes, but entirely upon the fact of ſome crimes committed within the admiral's territory, having been tried by this court, particularly piracies committed at ſea in the years 1610 and 1613: and beſides theſe inſtances which he mentions, it is ſaid that in the year 1672, one Beith , a miniſter, was tried for killing a man on board a boat, within a port of the Iſle of Arran. But none of theſe caſes can ſuffice to eſtabliſh a juriſdiction in this court, which it had not by law; eſpecially as it appears from the records, that no objection to the competency of the court was there proponed, and that they all happened before the act 1681. In ancient times, when this juriſdiction of admiralty was firſt eſtabliſhed, the perſons employed in it ſeem to have been ignorant of their duty, which occaſioned the 157th act, 12th parl. James VI. limiting the juriſdiction of admiral to the ſame bounds it was in the time of James V. Afterwards the judges of the admiralty became more experienced and reſpected; ſo that by another act, being the 15th of the 20th parl. of James VI. the admiralty was expreſsly declared to be a *ſovereign judicatory*, upon this narrative or conſideration, "that the inſufficiency, corruption, and defects which were in the deputes and members of theſe courts in former times, and "whereby theſe judicatures were not thought worthy of "that favour, is now helped and well amended." It is not therefore ſurpriſing, that while the admiralty was in this weak ſtate, the juſtice court ſhould have made encroachments on its juriſdiction; for the very ſame thing happened

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to the juſtice court itſelf, as in thoſe days, and even down to the time of Sir George Mackenzie, the lords of ſeſſion, as being the more potent and reſpectable judicatory, uſed to encroach on the juriſdiction of the juſtice court, by not only advocating criminal cauſes, from inferior courts, but even ſuſpending its ſentences, although no ſuch power is now pretended to be in the ſeſſion. It likewiſe appears, that the judges of the admiralty were different, and uſed to call in the juſtices to aſſiſt them as aſſeſſors in difficult cauſes, which led theſe juſtices to uſurp upon the admiral's juriſdiction, and even to take upon them to try ſome of his cauſes, even ſuch as piracy, in their own court; but theſe were only ſo many illegal encroachments, which cannot be regarded, and which have not been repealed ſince the act 1681, confirming the admiral court in its juſt privileges. For with regard to any caſes that have occurred in this court ſince that ſtatute, none of them do go the length of affording a precedent for this court's trying in the *firſt inſtance* a crime entirely committed within the admiral's territory.

In the caſe of Sir Alexander Anſtruther, in the year 1720, the crimes charged were the carrying a man by force from a houſe, after beating him there, then putting him on board a veſſel, and from thence landing him and carrying him as a priſoner through the country; whereby it appeared that the crimes charged were begun and terminated within the juriſdiction of this court, and which therefore behoved to be competent to try them. The like was the caſe of Paton, and others, tried in the ſame year 1720 for ſedition, riots, and hameſucken, by aſſaulting people within the territory of this court, then plundering a ſhip of meal, and carrying that meal into the country. In thoſe caſes no objection could be to the competency of this court, and none was made thereto. In the next caſe of Thomas Gray, in the year 1751, the objection was indeed ſtated for the pannel in regard that the forcible marriage was laid as committed by him upon the ſands of Muſſelburgh, but it was moſt juſtly repelled, in regard not only that it did not appear that the ſame happened within the flood-mark, but in reſpect that the forcible marriage was only a branch of the crimes charged againſt him, he being accuſed of a forcible abduction of a young woman from Canon-milns to the ſands, and of having carried her back from thence to Jock's-lodge, where he attempted, by violence, to conſummate his pretended marriage: ſo that the offences charged were both begun and ended within the territory of this court, which was ſufficient to eſtabliſh the juriſdiction in that caſe. And as to the caſe of James Johnſton,

ſion, and others, who were tried in this court in the year 1756, for a riot at Pittenweem, it appears that the court doubted of its own juriſdiction; and therefore heard the counſel for the proſecutor in ſupport of it, as the counſel for the pannels refuſed to make any objection, or ſo much as to argue upon the point. Under theſe circumſtances, where all the argument was on one ſide, the court found that the trial might proceed before them; but they did ſo upon the ſame principles as had governed the caſe of Gray already mentioned, ſeeing the indictment did there charge that the crime begun by the pannel, and others, aſſembling in a tumultuous manner, with offenſive weapons, horſes, carts, &c. upon the land; that they then went aboard a ſhip lying in the harbour at Pittenweem; and having confined the officers of the cuſtoms, took out all her cargo, and from thence carried the goods on a board to Leuchars; "and "diſpoſed of them as their property, and payed the ex- "pences of carrying the ſame." Here was continued wrong both begun and ended within the juriſdiction of this court; and where that happens, it is impoſſible to divide the cognizance of a crime, and lawyers hold that the *forum* may be eſtabliſhed, *ubi crimen inchoatum eſt*; and much more ſo muſt that court have juriſdiction within whoſe territory a crime is both begun and ended. None of theſe caſes therefore do in the leaſt affect the preſent, where the whole of the crime charged is admitted by the proſecutor to have happened within the admiral's territory, and conſequently the court can take no cognizance of it in the firſt inſtance, unleſs it has truly a cumulative juriſdiction with the admiral in every crime whatever; for by the ſame rule that the court can try a murder ſaid to have been committed within the flood-mark, it may try a like crime committed on the high ſeas at any diſtance from the ſhore, which was never attempted to be done in any caſe, at leaſt ſince the act 1681, and which would be totally ſubverſive of the admiral's juriſdiction. Nor is there any ground for a diſtinction between crimes properly maritime, or not maritime, though alike happening within his territory, as if the admiral were privative in the one and not in the other; or, in other words, that he is privative in ſuch crimes as piracy or others relative to ſhipping, and not in murder which can be committed at land. Every crime is a maritime crime in the ſenſe of the act 1681, if it be ſuch as can be committed either at ſea, or within flood-mark, which murder, as well as robbery, undoubtedly can be; and it would lead to the moſt abſurd conſequences, were

any other diſtinction to be received. A deforcement of revenue officers certainly can be committed at land as well as at ſea; and yet in the caſe of Lamb, in the year 1723, when charged to have been committed on board a ſhip, this court ſeem to have held it as not falling within their juriſdiction, but within that of the admiral; and ſo late as the year 1759, when William and Alexander Avens, and other fiſhers at Buckie, were tried for boarding a boat in a creek near the town of Findochlie; and there beating and deforcing the cuſtom-houſe officers, and carrying the boats and goods to ſea, the then lord advocate thought it neceſſary to bring the trial before the judge of the admiralty, which it may be preſumed he would not have done had he not been of opinion, notwithſtanding the caſe of Pittenweem and others above-mentioned, that ſuch a crime, when committed entirely within the admiral's territory, would only be tried in the firſt inſtance before that judge. Indeed, that no other diſtinction can take place, but that ariſing from the *locus delicti* is manifeſt from what has been already ſtated; and which is alſo enforced by the principles of the law of England, where for aſcertaining what crimes, as well as what contracts fall under the cognizance of the admiral or the courts of common law, no other criterion is fixed but that of the place where the crime or contract had its exiſtence; ſo that if the ſame was within the admiral's juriſdiction, the cognizance thereof is peculiar to him. This appears from the new abridgement of the law, commonly called Bacon's, but ſaid to be the work of lord chief baron Gilbert, vol. 1ſt. p. 623, *et ſeq.* And ſo well was the admiral's juriſdiction in crimes committed within his territory held to be eſtabliſhed, that it required an expreſs ſtatute, *viz.* that of the 28th of Henry VIII. cap. 13. for authoriſing the trial of ſuch offences by commiſſion according to the rules of the common law, inſtead of the civil law, which otherwiſe takes place in the court of admiralty. That ſtatute provides "that all "felonies and robberies, *&c.* upon the ſea, or in any ha-"ven, river, creek, or place where the admiral or admirals "have, or pretend to have, power, authority, or juriſdic-"tion, ſhall be enquired, tried, *&c.* upon commiſſions di-"rected to the admiral or admirals, or to his or their deputy "or deputies, and to other three or four ſubſtantial perſons "named by the lord chancellor;" which clearly ſhews that the juriſdiction of theſe crimes was ſtill kept diſtinct from that of the courts of common law. And as we have no ſuch ſtatute in Scotland, it fortifies the preſent argument, that felonies committed within the admiral's territory muſt be tried

before

before the admiral, where the ſame form of trial by jury, and the ſame rules of law are obſerved, as in this court of juſticiary. It is true, that in England the courts of common law, have cognizance of offences committed upon the ſea-ſhore or ſands, when not-covered with water, and even in ports and rivers, when *infra corpus comitatis*; but that cannot at all affect the preſent caſe, becauſe the territory of the admiral of England is limited to the high ſeas, and does not extend to the ſhores, unleſs when covered with water, nor to any waters within the body of a country; whereas the juriſdiction of the Scots admiral does by expreſs ſtatute extend to ports and harbours, and to the ſea-ſhore as far as the higheſt tide flows, whether the ſands or ſhore below the flood-mark be at the time covered with water or not; and where his juriſdiction or territory begins, there the juriſdiction of this court in the firſt inſtance muſt terminate.

HAY-CAMPBELL and ſollicitor DUNDAS for the proſecutors anſwered,

THAT the priſoner at the bar ſtands indicted before this high court of juſticiary for the crime of murder committed by him as follows:---That on the 24th October laſt, Alexander earl of Eglintoun having gone to take the air in his coach in the neighbourhood of his own houſe, in the county of Air, one of his ſervants came up to the coach, and informed him of two perſons being upon his grounds of Ardroſſan, one of them with a gun; upon which the earl, who had ſtrictly prohibited, by publick advertiſements, all perſons from ſhooting or killing game upon his eſtate, mounted on horſeback, rode after, and came up with them, after they had got upon the adjacent ſands; and finding the priſoner to be the perſon who carried the gun, the ſaid earl remonſtrated with him for ſo doing, and deſired him to deliver up the gun, which the priſoner refuſed, and ſoon after cocked the gun, preſented and pointed it at him, going onwards at the ſame time, till at laſt the gun was fired, and a mortal wound given to the earl, in the way and manner ſet forth in the indictment, of which wound the earl died that ſame night.

This is the ſubſtance of the charge: and it has further been explained in a ſeparate minute made upon a motion of the court in the beginning of the debate, that the ſands ſpecified in the libel, adjacent to the lands of Ardroſſan, are the ſands of the ſea; and that the gun was fired, and the wound given, within the high-water-mark: both parties being then upon the dry beach, or ſhore, between the high and the low-water-mark.

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An exception has from thence been taken to the jurisdiction of the court, founded upon a supposed exclusive privilege in the lord high admiral of Scotland, and his deputies, to try all crimes committed upon the seas, or in ports, harbours, and creeks of the same, or upon fresh waters and navigable rivers below the first bridges, or within the flood marks. But to this exception, founded chiefly upon an act of the Scots parliament, *anno* 1681, chap. 16. the following answers occur for the prosecutors.

At what time the office of high admiral first arose in Scotland, does not with certainty appear; but there is clear evidence that his jurisdiction is not antient. It is probable that his office was originally of a mere ministerial nature, conferring a command at sea in time of war, and attended with certain powers and privileges relative to sea affairs, particularly with regard to prizes, and to wrecked goods, but without any judicial cognizance or jurisdiction. Afterwards he came to assume a power of judging in maritime affairs even in time of peace; but still this jurisdiction went no farther than to cases strictly maritime, and was cumulative with the universal and radical jurisdiction which the supreme judges of the common law, both in civil and criminal matters, had over the whole kingdom.

Alexander King, a manuscript author upon the admiralty of Scotland, who wrote in the last century, and who must be supposed to have understood the subject, as he himself enjoyed the office of judge of the court of admiralty, gives an account of the rise and progress of this jurisdiction, similar to what has already been suggested. He says the admiral was an officer appointed in time of war, to preside over the king's fleets, and took a military oath; that in time of peace he exercised a jurisdiction consequent upon his office, which the author explains in these words. *De omnibus itaque contraversiis marinis cognoscit amorans. Marinas contraversias intelligo omnes eas quæ navigationis ratione ineuntur, sive ex contractu vel quasi contractu, sive ex maleficio aut quasi ex maleficio oriuntur, nec inter est in mari an in terra contractus celebrentur, delicta tamen ex necessitate intra maris fluxum perpetrari debent.*

What shews that this jurisdiction is not of an early date in Scotland, is, that no mention is made of it in the *Regiam Majestatem*, or in any of the other relicks of our antient statute law, collected together in that book, though it is remarkable that all the other jurisdictions in Scotland are particularly treated of and described; for example, the justice court, the sheriff court, regality courts, chamberlain courts, *&c.* Further it appears from Sir George Mackenzie, (Crim. part 2. tit.

tit. 9.) and from the act of parliament 1593, c. 154. and conſtitutions ratified thereby (*vide* Appendix to Statute Law abridged) that the deans of guild, of burghs, and water-baillies were in thoſe days the judges in civil maritime queſtions; and that the lord juſtice-general, and his deputes, were the judges in criminal cauſes of a maritime nature.

The juſtice general, and his deputes, were indeed the ſupreme criminal judges over the whole kingdom, without any exception, either as to cauſes, or as to territory. Their commiſſions were ample and unlimited. The grants of juſticiary to the family of Argyle, who long enjoyed that high office, were *infra totum regnum noſtrum*, and to determine *omnes et ſingulas cauſes criminales* One of them by James the Vth. to Archibald earl of Argyle, dated 28th October, 1529, is exhibited to the court. There are likewiſe many old ſtatutes appointing the juſtice and his deputes to hold courts in the different parts of the kingdom, iſlands included, that juſtice might be adminiſtered over the whole realm, (ſee Skene *voce Iter*) and no diſtinction appears between crimes committed upon the coaſts, harbours, or ſeas, and thoſe committed within the body of the kingdom: on the contrary, certain treſpaſſes which ſeem to be of a maritime nature, are mentioned in ſome of the old ſtatutes (ſtat. Rob. I. c. 11. parl. 1449. c. 9.) as puniſhable by the juſtices, ſuch as killing ſalmon within the ſea or flood-mark in forbidden times, and other matters relative to cruives and fiſhings.

The firſt notice taken of the admiral's juriſdiction in any of our ſtatutes, is in parliament 1592, cap. 160. of the ſmall edition; and from this act it appears, that in the preceding reign, *viz.* that of queen Mary, the earl of Bothwell, lord high admiral, had obtained ſome unuſual clauſes in his grant of admiralty, and uſurped a higher juriſdiction than was conſiſtent with the law, which having been greatly complained of, the ſaid act was made in order to remedy the abuſe, and to reſtore matters to where they were before the death of James the Vth. At the ſame time it is remarkable, that even in queen Mary's reign cauſes ſtrictly of a maritime nature were judged by the court of ſeſſion in the firſt inſtance. This appears from the caſe of lord Bothwell *contra* Fleemings, 9th March, 1543, which is to be found in Sinclair's Manuſcript Collection of Deciſions, in the advocate's library. The only peculiarity obſervable in this caſe, is, that the judge admiral is ſaid to have taken his ſeat in the court of ſeſſion, and voted along with the judges of that court, which he was probably allowed to do from *comitas*, or from the idea of cumulative juriſdiction, as we ſee from the act 29. parl.

parl. 1537, that this was practiſed in other caſes of cumulative juriſdiction.

The next mention of the admiral is in the act 15th parl. 1609, and the notice which is there taken of him does not convey a high idea of his juriſdiction. In 1606 an act had paſſed directing execution of horning to paſs on the decrees of ſheriffs, ſtewarts, and baillies; but in which act it would ſeem the admiral and his deputies had been purpoſely omitted, becauſe not worthy of that privilege. Some care, however, had been taken before the year 1609 to fill the offices of admiralty with more able and proper men; and an act was then paſſed, allowing the ſame execution to proceed upon their decrees, as in the caſe of other inferior judges; and indeed there was more reaſon for this regulation with reſpect to admiral decrees than in any other caſe, becauſe ſtrangers and ſeafaring people being generally the parties concerned, it was very proper that there ſhould be ſummary execution upon them. This act indeed mentions the admiral court as a ſovereign judicatory; but the meaning of this is explained by Sir George Mackenzie, in his obſervations, to be, that the high court of admiralty held at Edinburgh is ſuperior to all the deputy admiral courts held in other parts of the kingdom, and has a power of reviewing both the ſentences of theſe inferior admirals, and alſo his own decrees. It was ſtill a court ſubordinate to the ſeſſion and juſticiary, and remains ſo to this day; as it is a point not diſputed, that the decrees of the high court of admiralty, even in cauſes the moſt ſtrictly maritime, are liable to be brought before the ſupreme courts of ſeſſion and juſticiary in the ſecond inſtance, by way of ſuſpenſion or review; and at the time of the act laſt referred to, they could be brought alſo in the firſt inſtance, as already mentioned.

In the years 1610, and 1613, recently after the act 1609, two inſtances appear on record of trials for piracy, one of them before the privy council, and another before the court of juſticiary. Sir George Mackenzie takes notice (Crim. Part II. tit. 9.) of them, and lays it down as a clear propoſition, that the admiral's juriſdiction was then cumulative with that of the juſticiary, even with regard to crimes of a maritime nature committed at ſea.

And indeed the caſe could not be otherwiſe, for however ample the grants of juſticiary have been to the lords high-admiral, they could not be more ſo either as to territory or cauſes than thoſe voted in the two ſupreme courts of ſeſſion and juſticiary. Theſe courts had an univerſal juriſdiction over the whole kingdom without exception; and therefore

the neceſſary conſequence of the admiral's having likewiſe a juriſdiction either of one kind or another, was, that he exerciſed that juriſdiction *in cumulo* with the ſupreme courts. In order to make the admiral excluſive with reſpect to his juriſdiction, or any part of it, a ſtatute was neceſſary, declaring him to be ſo, and prohibiting the ſupreme courts from exerciſing that branch of juriſdiction.

The courts of ſeſſion and juſticiary have a clear, radical, and original right, to judge admiral cauſes as well as others, unlimited as to territory, and without diſtinction as to matter. If the admiral therefore, a magiſtrate of recent date, claims any privative juriſdiction, he muſt prove it; and accordingly he appeals to the act 16th of the parliament 1681, as the charter of his excluſive jnriſdiction.

The proſecutors do admit, that by this act, he has obtained an excluſive juriſdiction in the firſt inſtance with reſpect to certain matters; but they contend that this excluſion can go no further than the act carries it; and that both from the words and intention of the law, and from the reaſon of the thing, it is clear that his excluſive juriſdiction, both in civil and criminal matters, is limited *ratione cauſæ*. The act conſiſts of two parts, which are apt to be blended together, and not ſufficiently diſtinguiſhed, viz. a declaratory, and an enacting part. The firſt points out what the juriſdiction was then underſtood to be; it declares the court to be ſovereign, and to import ſummary execution, the meaning of which has already been explained. The ſecond part proceeds likewiſe upon a recital or narrative, that the high-admiral is his majeſty's lieutenant and juſtice-general upon the ſeas, and in ports, harbours, creeks, &c. and enacts that he ſhould have "the ſole privilege and juriſdiction in all *maritime and ſea-faring* cauſes foreign and domeſtic, civil or *criminal*, whatſoever *within the realm*, and over *all perſons* concerned in the ſame;" and prohibits all other judges from any cognizance of the *ſaid cauſes*, in the firſt inſtance. The after-part of the act allows ſuſpenſions of their ſentences in theſe cauſes, but no advocations.

The recitals contained in this act, declaratory of the powers already veſted in the office of high-admiral, muſt be explained by the law and practice antecedent to that period, and ought not to be mixt with the enacting words, which give a new additional privilege to the high-admiral of being excluſive in the firſt inſtance as to certain cauſes, viz. maritime and ſea-faring queſtions civil or criminal.

Formerly, although he was a lieutenant and juſtice-general, and a ſovereign court in certain reſpects, yet his juriſdiction

was

the admiral, is contrary to the ideas of the ſtatute law, and has been altogether an uſurpation.

The admiral, in civil caſes, being clearly univerſal as to territory, and limited *ratione cauſæ*, cannot be otherwiſe with reſpect to criminal matters; for it would be moſt anomalous to ſuppoſe, that his criminal juriſdiction is juſt the reverſe of his civil one; and ſuch a ſuppoſition would be directly contrary to the act 1681, in which the words maritime and ſeafaring, are applied to criminal as well as to civil cauſes.

It is true, there is this difference in the nature of the thing between civil and criminal queſtions, that few, if any inſtances can be ſuppoſed, of a maritime crime committed upon land; for which reaſon Alexander King, the author above mentioned, ſays, that maritime delicts, from neceſſity, muſt be committed within the flow of the ſea; but ſtill, if any caſe can be figured of a maritime crime committed upon land, i. e. a crime relative to navigation, or to ſea-affairs, the cognizance of ſuch crime falls undoubtedly in the firſt inſtance under the admiral's privative juriſdiction; and on the other hand, forgery, perjury, adultery, murder, &c. committed on board a ſhip, fall clearly to be tried before the court of juſticiary, and are improper for the admiral's cognizance.

The doctrine here laid down is ſupported, by the beſt authorities on the law of Scotland, as well as by precedents and the practice of their courts. In the hiſtorical law-tracts, the work of a very learned and accurate judge, (title Courts, p. 332,) this point is fully diſcuſſed and determined; and the author takes notice of a caſe of murder committed at ſea on board a boat, which having been tried before the court of juſticiary, the judges at firſt demurred, whether it fell under their juriſdiction; but, after mature deliberation, the juriſdiction was ſuſtained.

The author of the Law-inſtitutes, Vol. II. p. 540, agrees in opinion, that the excluſive juriſdiction of the admiral in criminal caſes, is limited to thoſe ſtrictly maritime. See alſo Mr. Forbes, in his Inſtitutes, Vol. II. p. 238, who enumerates the crimes which he thinks may be tried before the admiral.

Sir George Mackenzie, in his obſervations upon the act 1681, ſays expreſly, that the privilege thereby given to the admiral, is limited to maritime and ſea-affairs. Mr. Bayne, in his notes upon the Criminal Law, is of the ſame opinion.

Lord Stair mentions the ſubject in a very overly manner, without entering into particulars, and without making the proper diſtinctions; and the ſame thing is to be ſaid of Sir Thomas Craig. As to Balfour, p. 629, of his Practicks, his

his authority is taken from the laws of Olleron, and not from the municipal law of Scotland, see p. 614, of the same book; and his doctrine, if taken literally, goes plainly too far, for it includes the *affairs of merchandize and fishing*, which, by the law of Scotland, never were understood to fall under the admiral's privative jurisdiction.

Another author appealed to, viz. Wellwood, takes his ideas likewise from the sea-laws of other countries. At the same time, in p. 10. he explains the admiral's criminal jurisdiction in this way, "that they should have a sovereign jurisdiction "only proper to themselves, over all *sea-faring men* within "their bounds, and in all *sea-faring causes* and debates, civil "and criminal."

As to precedents, besides those already mentioned, a case appears, 13 June, 1672, of a minister in the Isle of Arran, being tried and condemned by the court of justiciary for murder committed on board an Irish ship, lying in the harbour of that island. The crime was commenced, carried on, and perpetrated on ship-board, and no doubt appears to have been entertained of the jurisdiction.

Upon the 9th of August, 1720, Fairney and others were tried before the court of justiciary for the crime of mobbing and sedition, by going tumultuously, armed with axes, &c. and invading an English ship lying in the harbour of Leven, wounding sailors, cutting the rigging, unhinging her rudder, carrying away sails and anchors, cutting holes in her bottom, damnifying cargo, &c. A similar case was tried 2d of February, 1756, where James Johnston, and others, were charged with having violently boarded a ship in Pittenweem-harbour, in which there were uncustomed goods, seizing the tide-waiters, confining them to the cabin, unloading the vessel, and then turning her adrift. The court demurred to the jurisdiction; and though the counsel for the pannels waved the objection, they ordered the other party to be heard; and, upon deliberately considering the matter, found the court competent. The crime here was likewise commenced and carried on aboard the ship; and it could make no difference in the argument, that the goods were taken from on board, and carried to a house on land, for the crime consisted in the hostile invasion of the ship, and the other acts committed there.

Upon the 6th of July 1722, Helen Wilson was tried before the court of justiciary for child-murder; and the fact charged against her was, that she had carried her child to the west side of an island, called Lammas-Island, nigh the harbour of Dunbar, and thrown him from a rock, whereby he was killed. This rock hangs over the sea; and there is no

doubt that the crime was committed within the ſuppoſed juriſdiction of the admiralty. It is believed a ſimilar caſe was lately tried before the circuit-court at Aberdeen, and no inſtances will be found of trials of that kind before the admiral.

The caſe of M'Adam and Long, in 1735, is likewiſe remarkable. They were tried before the admiral for killing Hugh Fraſer on board a boat on the ſea. The admiral pronounced an interlocutor on the relevancy, by which the defence being too much narrowed, the pannels were found guilty by the jury, and condemned by the judge. Upon application to the court of juſticiary, the ſentence was ſuſpended; and thereafter the priſoners having petitioned the court for liberation, the lords of juſticiary "granted warrant to ſet the petitioners at liberty, upon finding ſufficient caution acted in the books of Adjournal, each of them under the pain of 300 merks, that they ſhould anſwer to any criminal libel, or indictment, that ſhould be exhibite againſt them before the court of juſticiary within the ſpace of ſix months after the date of the bail-bond, at the inſtance of his majeſty's advocate, for the crimes mentioned in the petition." The court here underſtood themſelves to be cumulative with the judge-admiral, with reſpect to murder committed at ſea, as they obliged the pannels to find bail to ſtand a new trial before themſelves.

As to the caſe of Lamb and others, mentioned on the other ſide, none of them go further than to prove the admiral's exerciſe of a *cumulative* juriſdiction with reſpect to crimes committed at ſea, or in ports, &c. and this he has acquired by preſcription in the ſame way as he has done the cognizance of civil cauſes mercantile. Neither does Lord Royſton, in his manuſcript notes, give any thing more to the admiral than a privative juriſdiction in maritime cauſes, in terms of the act 1681. It is ſaid, that a declinature of the court was moved in the caſe of Lamb; but the record does not ſhow what that declinature was, or the proceedings on it. Neither does it appear whether the crime tried was maritime or otherways.

It was ſaid, that if the court of juſticiary could try murder committed within the admiral's juriſdiction, this would go the length of murders committed, not only within the narrow ſeas or ports belonging to Scotland, but in the moſt diſtant parts of the ocean; which the pannel's counſel were pleaſed to figure as ſomething extremely incongruous. But, with ſubmiſſion, where does the incongruity lie? when upon all hands it is admitted, that the courts of ſeſſion and juſti-

ciary

clary can do every thing in the second instance, that the admiral can do in the first? These supreme courts being competent to review the admiral's sentences, have clearly a jurisdiction over his territory; and they do not dispute with him that certain matters must, in the first instance, be tried before him. There is no defect of jurisdiction, but merely a statutary injunction, that maritime causes shall first be tried by the admiral, subject to the review of the supreme courts. If the admiral can try a crime committed on the most distant parts of the ocean, there can be no doubt that the court of justiciary can do the same, though, in order to enable both the one and the other to do it with effect, the person guilty must return to Scotland, so as to come within their power, and be personally brought to trial.

It was next said, that foreigners coming accidentally here on shipboard, ought not to be tried by the municipal laws of the country, but by some general law of nations. But in the first place, this observation, when applied to the practice in Scotland, fails in one material particular, viz. that the admiral, in criminal cases, tries according to the municipal laws of Scotland. 2dly, The observation could at any rate go no further, than to make it expedient that he should have the cognizance over sea-faring *persons*, as well as seafaring matters: but no reason from thence occurs, why, in cases which neither concern seafaring matters, nor seafaring persons, he should have an exclusive jurisdiction. At the same time, it has already been fully explained, that his jurisdiction is distinguished *ratione causæ*, in the same way as ecclesiastical, military, or consistorial jurisdiction, and that his pretended exclusive jurisdiction over a territory is without foundation.

It was argued, that originally under the feudal governments, all jurisdictions were territorial and privative, and particularly the jurisdictions of barons and lords of regality in Scotland, who had a power of repledging even from the justice-courts. But whatever may have been the case with respect to those ancient jurisdictions, it is plain that the admiral's was of a different nature. The power of repledging, competent to barons, royal burroughs, and lords of regality, was much weakened, if not totally annihilated, before the admiral's jurisdiction had an existence. And even in the earliest times, a baron who repledged was obliged to find surety in the court where the criminal was attached, to do justice within year and day. Quon. Attach. Cap. 8. As soon as the court of session was established, all courts in the kingdom were rendered subordinate to that court in civil matters, and the power of repledging in criminal cases was also by degrees

grees taken away. These cases, however, of barony and regality jurisdiction have nothing to do with the present question.

Another argument used was, that warrants and executions issuing from the session and justiciary required the concurrence of the admiral, in cases where they were to be used upon the sea, or in other parts of his supposed territory.

But when this matter is enquired into, it turns out to be of no consequence to the argument. When letters of horning and poinding are issued in civil cases, if a ship or other maritime subject is to be affected, it is usual to apply for the admiral's concurrence, who writes on the back of the letters in these words, "The judge of the high court of admiralty "hereby grants his concurrence for putting the within letters "to due and legal execution as to all maritime subjects." This proves nothing but that the admiral is the proper judge in maritime affairs, and who has the power over maritime subjects. In order to arrest a ship his concurrence may be thought necessary; but it is an admitted point, that in civil questions, though arising on board a ship, if they are not of a maritime nature, his jurisdiction is not privative.

As to criminal warrants, the practice is not uniform. Instances happen every day of warrants to apprehend criminals granted by the judges of justiciary, being executed on board ships by the macer of justiciary without any other authority. An instance occurred within these few months of two criminals being apprehended on board a ship lying at and carried to prison by the macer, upon a warrant of that kind; and it can be proved by the macers and other officers of the law, that this is a case which frequently happens.

At the same time, it is believed that other instances can be given of applications made for the assistance of the admiral's officers to execute warrants on board a ship; and the reason of the practice seems to be this, that the messenger who executes a justiciary warrant being constituted *a sheriff in that part*, for the purpose of executing said warrant, it may be doubted how far his power of sheriffship conferred upon him could reach to parts which are beyond the ordinary bounds of a sheriff's jurisdiction. The defect therefore, if there is any, lies not in the want of jurisdiction in the court, but in the want of power in the executional officer.

At the same time it is more probable that the only meaning of the practice is, that as all officers of the law are required to give their assistance in executing such warrants, the macer of justiciary, when he has occasion to go on board a ship, naturally calls for the assistance of the officer of admi-

ralty, under whoſe immediate inſpection all ſhips are; and for the moſt part the admiral hears nothing of the matter, all that is done being to take the officer's concurrence, who, accordingly, upon being deſired, gives his aſſiſtance in executing the warrant.

It is plain, from what has already been ſaid, that the court of juſticiary has, at leaſt, as ample a juriſdiction in point of territory as the admiral court can poſſibly have. Both their commiſſions are equally extenſive. The warrants of juſticiary go into the ſuppoſed territory of the admiral, and are every day executed there, ſometimes with concurrence of the admiral's officer, and as often without it. Every act of that kind would be null and void if the court of juſticiary had no juriſdiction over that territory. Nay, the court, and the officers of juſticiary would be every day liable in the penalties of wrongous impriſonment, were there any foundation for the pretended excluſive juriſdiction of the admiral; and it is plainly of no conſequence, that the admiral's aſſiſtance, or rather that of his officer, is ſometimes required for the reaſons already mentioned.

It was, in the laſt place, ſaid, that the law of France, and the law of England made in favour of the pannel's doctrine, and particularly an ordonance of Lewis XIV. made in the ſame year with the act 1681.

It is immaterial to enquire what the laws of other countries may be in a matter which depends on the municipal laws of Scotland, and the conſtitution of Scots courts. The proſecutors are unacquainted with the law of France, where the admiral's juriſdiction may poſſibly be territorial in the ſame way as in England; but from the authorities appealed to on the Engliſh law, they apprehend that no argument whatever can be drawn from them to the preſent caſe. It would ſeem that in England all crimes muſt be tried as in a certain county, and that crimes committed upon the high ſea not being within the body of a county, are tried by ſpecial commiſſions of admiralty. The juriſdiction there is diſtinguiſhed not *ratione cauſæ*, but *ratione territorii*. All maritime contracts entered into upon land are determined by the courts of common law; and all matters of whatever kind which take their riſe upon the ſea, are tried by admiralty courts.

At the ſame time it appears from judge Hales, Vol. II. p. 16, &c. and other authorities, that the diſtinction of territory is between land and water; and that a crime committed, or contract entered into upon the dry beach or ſhore, though within the flood mark, falls under the cognizance of the common law courts. The ſpace between the high and low

water

water mark is interchangeable, being a part of the ſea when covered with water, and parcel of a county when not covered; and the caſe of one Lacie is mentioned, where it was found that if a man be ſtricken upon the high ſea, and die upon the ſhore after the reflux of the water, the admiral, by virtue of his commiſſion, hath no cognizance of that felony. Had the preſent caſe therefore happened in England, there would have been no doubt of juriſdiction.

And this leads the proſecutors to conclude with an obſervation upon the act 1681, which was omitted in the courſe of the argument, viz. that although the flood-marks or firſt bridges are mentioned in deſcribing the admiral's juſtice-generalſhip upon navigable rivers; yet theſe expreſſions ſeem to be applicable ſingly to *navigable rivers*, and not to the ſhore of the ſea in other places. It may be neceſſary, in the caſe of rivers, to point out ſome boundary of that kind between the river and the ſea, to ſupply the want of a viſible boundary; but with reſpect to the ſea-ſhore, no ſuch boundary is neceſſary, becauſe nature itſelf points out the diſtinction between dry land and water, viz. where the dry land ends, and the ſea begins; or in other words, the margin of the water at all times, whether at high or low ſea.

If this obſervation be juſt, the pannel in the preſent caſe could have been been brought to trial no where elſe but before your lordſhips, as the fact was not even committed within the ſuppoſed territory of the admiral. And upon the whole, as the preſent caſe has nothing to do with maritime affairs, as neither a ſea-faring matter, nor ſea-faring perſons are concerned; as the unfortunate lord was murdered upon the dry land, within a few yards of his own property; and as the court of juſticiary is the ſupreme criminal court of this country, no reaſon occurs why ſo important a trial ſhould be ſent to the admiral court.

JOHN DALRYMPLE replied,

THAT he had two propoſitions to maintain; firſt, that the admiral has a general criminal juriſdiction within flood-mark; and ſecondly, that that juriſdiction is privative: for the firſt, he refers to the following authorities. Preſident Balfour, p. 629, in the reign of queen Mary: Melvil, p. 10, and 11; and Craig, old edition, p. 378. In the reign of king James VI, Sir George Mackenzie, p. 197: and Stair, p. 675, in the reign of Charles II. the ſtatute 1681, and Bankton, Vol. II. p. 540, who wrote lately. The ſecond propoſition is proved, firſt, by the nature of juriſdiction in Scotland; ſecondly, by the nature of the admiral's juriſdic-

tion; and laſtly, by authorities of the Scots law. With regard to the firſt of theſe, upon the conqueſt of the Roman provinces by the feudal nations, the old juriſdictions were aboliſhed, and new ones eſtabliſhed. All theſe new juriſdictions were bounded by territorial lines, and were privative in the firſt inſtance, though ſubject to the review of the king's courts: the baron, the ſheriff, the bailie of a burrow, the lord of regality, and the proprietor of a private juſticiary, all judged the people living within their reſpective bounds, and were privative of other courts, the abſolute proof of which is, that they could repledge their people from each other, and from the king's courts. Quon. Attach. cap. 4. Balfour, p. 48. Stat. 1488. cap. 1. Leg. Burg. 35, and c. 1. Iter. Juſt. p. 12. Nay, and the people were puniſhed if they ſubmitted to any other juriſdiction than their own. Quond. Attach. cap. 27. Book I. cap. 32. Balfour, Tit. Judges. Theſe original juriſdictions would have continued for ever privative, had not the king's courts been made cumulative with them by ſtatute. The ſupreme civil courts of the ſeſſion, next of the daily council, and laſtly, of the council and ſeſſion, were all made cumulative by different ſtatutes; and in the ſame way the ſupreme criminal court, that of the juſticiary was made cumulative with the original juriſdictions, otherwiſe they muſt have continued privative to this day. The admiralty juriſdiction was originally in the family of Lenox, and paſt by ſucceſſion to the crown, as heir to that family. It was bounded by a territory, viz. the flood-mark; and it could ceaſe to be privative only, by one or two ways, either in quality of the original creation, or a ſtatute, making the juriſdiction of the common-law courts cumulative with it, neither of which was the caſe here. Secondly, a ſecond proof from the nature of juriſdiction, is, that the writ of no other court can be executed in the bounds of the admiral; no horning, caption, poinding, and arreſtment, or warrant of the court of juſticiary, can go into his bounds without his concurrence. The court of juſticiary cannot have a juriſdiction where it cannot execute any writ. Again, the juriſdiction in queſtion is privative, from the nature of the admiralty juriſdiction. The juriſdictions ariſe from the neceſſities and intereſts of trade, for nations at firſt would not trade with each other, unleſs queſtions, which aroſe betwixt traders, were to be decided by the law of nations which they knew, and not by the municipal law which they did not know; and unleſs their perſons, when they went to the ſeas and the harbours on the coaſts of the foreign country were to be judged by a judge who proceeded upon the law of nati-

nations. Laſtly, the authorities of the Scotch law ſhowed the juriſdiction to be privative. Balfour ſays ſo, p. 629. Melvil, p. 10, and 11, &c. Lord Stair, p. 675. for in this laſt author, the word *proper* involves in it *property*; it is applied and repeated to four different courts, all of which have a property in their own juriſdictions, and are privative of all other, *quoad* the objects which lord Stair aſſigns to them; but the act 1681 puts the matter out of doubt, as will appear from the admiral's juriſdiction; for there is no knowing the law, without knowing the hiſtory of the law. It was originally privative; but as there was only one judge, with a trifling influence for his trouble, and he, often modeſt and diffident, he applied, in difficult caſes, to the king and council for aſſiſtance; they ordered the court of juſticiary to aſſiſt them, Mackenzie, p. 193. From thence the court of juſticiary came to give him aſſiſtance where it was not aſked, Balfour, p. 634. Melvil, p. 10. And thus the court of juſticiary came, before the act 1681, to take upon them to proceed, though unwarrantably, as if they had been cumulative with him. Mackenzie.

In the year 1681, the duke of York came to Scotland, to take the adminiſtration of it. He was the king's commiſſioner to the parliament, and lord high admiral of Scotland. Among many vices he had one virtue: he was fond of naval affairs and of trade. The acts of the parliament 1681 ſhow his attention to theſe objects; and, among others, the act in queſtion, for the diſadvantages to trade of encroaching upon the privative juriſdiction of the admiral being obvious, this act was a remedy for thoſe encroachments, and declared the original privative juriſdiction of the admiral. At that time the duke of York was in cloſe connections and correſpondence with Lewis XIV. and the act in queſtion was borrowed from an ordonance of that prince. The dates ſhow this, for the act is dated a month after the ordonance. The preambles ſhow it, for the ſubſtance of both is the ſame, though there is more *verbiage* in the French preamble; and the enactment is the ſame, for they both declare the criminal juriſdiction of the admiral, and that that juriſdiction ſhall be privative; ſo that the two acts muſt have been concerted together. Moreover, the act 1681 declares the admiral's juriſdiction to be *ſovereign*, which draws this conſequence after it, that it muſt be privative, for there is no ſovereignty without independance of the other four ſovereign courts in Scotland; the ſeſſion, juſticiary, exchequer, and parliament, conſidered as a court are all privative. It declares too the admiral to be *juſticiary in the high ſeas*; but every court

court of juſticiary is in its own nature privative. The juſticiary of all Scotland in the hands of the Argyle family was privative till bought off. The juſticiary which they retained over Argyleſhire after the ſale, continued privative; the Highland juſticiaries were privative; the preſent court of juſticiary is privative upon the land, and upon the ſame plan of analogy; the juſticiary of the admiral muſt be privative in his bounds, *viz.* the ſea, the harbours, and the coaſts. Such are the heads or ſubſtance of the arguments and authorities, proving that the admiral's juriſdiction is privative and excluſive of that of this court, at leaſt in the firſt inſtance; but as the queſtion is of conſiderable importance to the conſtitution of both courts, and to the people of this country, as well as foreigners, it would be neceſſary that the court ſhould appoint informations to be given in upon it, in order that the matter might be treated as fully as it requires, and conſidered with due deliberation.

Mr. Dalrymple further repreſented, That having written the foregoing reply without ſeeing the anſwer made on the part of the proſecutor, or having acceſs to any of the writs and manuſcript authorities referred to by the proſecutors counſel in the debate, he will be forgiven if he has omitted to anſwer any argument that may be there ſtated; and hopes it will be marked in the record of court, that his reply was drawn under theſe circumſtances.

Mr. Ilay Campbell anſwered, That both parties were in the ſame ſituation, having made up their minutes from the notes which they took of the pleadings, and there was no occaſion for any inſpection of each other's minutes.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh, vigeſimo ſecundo die Decembris milleſimo ſeptingenteſimo & ſexageſimo nono per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

Parties procurators preſent as in laſt Sederunt.

The lord juſtice-clerk, and lords-commiſſioners of juſticiary having conſidered the debate *viva voce* at their laſt ſederunt and foregoing minutes, they find, That the court has juriſdiction to try this indictment in the firſt inſtance, and therefore declare, That they will proceed accordingly.

(Signed) THO. MILLER, J. P. D.

The indictment being again read over in open court, and the pannel being interrogate, If he was guilty or not guilty, he anſwered, That he was not guilty.

Mr. Robert Cullen, on the part of the pannel, and Mr. Andrew Croſbie, on the part of the proſecutor, being heard at great length on the relevancy of the indictment, the lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his Majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court till to-morrow at twelve o'clock, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the meantime to be carried back to priſon.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh, vigeſimo tertio die Decembris milleſimo ſeptingenteſimo & ſexageſimo nono per honorabiles viros Thomam Miller de Barſkimming, dominum juſtitiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer, at Saltcoats in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

Parties procurators being further heard at great length on the relevancy of the indictment,

The lord-juſtice-clerk and lords-commiſſioners of juſticiary, ordain both parties to give in to the clerk of court, informations upon the debate, in order to be recorded; the proſecutors to give in theirs againſt Wedneſday the third day of January next to come; and the procurators for the pannel to give in his againſt Tueſday the 16th day of the ſaid month; continue the diet againſt the pannel, and whole other diets of court till Monday the twenty-ſecond day of the ſaid month of January; and ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the mean time to be carried back to priſon.

*** *See the above-mentioned* INFORMATIONS, *printed at large, at the end of this Trial.*

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſecundo die Januarii milleſimo, ſeptingenteſimo & ſeptuageſimo per Honorabiles viros, Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the criminal indictment, raiſed and purſued at the inſtance of Archibald Earl of Eglintoun, brother-german to the deceaſed Alexander Earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, Eſq. his Majeſty's advocate for his Majeſty's intereſt, againſt Mungo Campbell, Exciſe-Officer at Saltcoats, in the county of Air, pannel, with the debate and informations thereupon, they find the indictment relevant to infer the pains of law;—but allow the pannel to prove all facts and circumſtances, that may tend to exculpate him from the crime charged, or alleviate his guilt; and remit the pannel, with the indictment as found relevant, to the knowledge of an aſſize.

(Signed) THO. MILLER, J. P. D.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his Majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till Monday the fifth day of February next, at eight o'clock in the morning, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to priſon.

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh quinto die Februarii milleſimo ſeptingenteſimo et ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarium clericum, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till Monday the 26th day of February inſtant, at eight o'clock in the morning, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to priſon.

(Signed) THO. MILLER, J. P. D.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſexto die Februarii milleſimo ſeptingenteſimo et ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The Interlocutor of relevancy being read over,

The lord juſtice-clerk, and lords commiſſioners of juſticiary, fine and amerciate Robert Sandilands of Herdmonſhiels, and Alexander Kincaid, Bookſeller in Edinburgh, each in the ſum of one hundred merks Scots, for not attending this day and place, to have paſt upon the aſſize of the ſaid Mungo Campbell, as they were lawfully cited for that effect, thrice called, and not compearing.

Mr. Maclaurine, for the pannel, repreſented, That the liſt of the perſons to paſs upon the aſſize had been made up by the clerk of court, who was in uſe to make up ſuch liſts; but that it would not be diſputed, that before making up the ſaid liſt, the doer for the private proſecutor had ſuggeſted to the clerk, that he was deſirous a number of landed gentlemen ſhould be upon ſaid liſt. That the clerk made up the liſt accordingly, which was laid before, and approved of by the judges; but that it would not be diſputed, that before the judges, at leaſt before it was ſigned by them, the ſaid liſt had been ſhown to, and approved of, by the doer, for the private proſecutor, at whoſe ſuggeſtions alterations had been made thereon. That he apprehended, in order to make a trial by a jury ſafe and fair, it is abſolutely neceſſary that the proſecutor ſhould have no concern in the nomination of the aſſize, or be allowed to ſuggeſt any particular perſon, or any

particular ſet of men, however reſpectable, to the clerk, as proper perſons to be put upon the liſt; becauſe, if that was allowed, an advantage might be taken of pannels, as perſons may be put upon the aſſize, who, from certain circumſtances and ſituations, may have prejudices againſt the pannel; and that, therefore, when any ſuch thing appeared, he apprehended, a liſt ſo made up ſhould be laid aſide, and another aſſize called; and that in this caſe, as it was not diſputed, and if diſputed, could be eaſily and inſtantly proved, that the doer for the private proſecutor had ſuggeſted to the clerk, that a number of landed gentlemen ſhould be put upon the jury, which was accordingly done, though not neceſſary in this caſe, as the pannel was not a landed man; and that the liſt of the aſſize had been ſhown to, and approven by the doer for the private proſecutor, he apprehended that a challenge lay againſt the array, or the whole aſſizers ſummoned.

Whereupon Mr. George Muir, principal clerk of court, being called upon by the court, and aſked, Whether what was ſet forth by Mr. Maclaurine was the truth?—He informed the court, that after he had made up a liſt of aſſizers in the uſual manner, to be laid before the judges for their conſideration, he being then confined to the houſe by indiſpoſition, —Mr. John Mackenzie, writer to the ſignet, agent for the proſecutors, happened to call upon him; and he having ſhewed him the liſt for the jury he had made up, which then conſiſted of more than forty-five perſons, Mr. Mackenzie obſerving the names of Sir William Cunningham, and Sir Robert Myreton among the jurymen, told him, he thought theſe improper perſons to be in the liſt of jurymen, on account of their near connection with the Earl of Eglintoun the private proſecutor; Sir William Cunningham being nephew to the Earl of Eglintoun, and Sir Robert Myreton father-in-law to Sir William.——Whereupon he ſtruck out the names of theſe two gentlemen: that this converſation was merely accidental, and he does not think that he had any other converſation with Mr. Mackenzie on the ſubject, previous to the liſt being ſigned by the court; that in particular, Mr. Mackenzie did not deſire him to take the jurymen from any claſs whatever.

Mr. Lockhart for the proſecutor thereupon moved, that as there was no relevancy in the objection to the liſt of aſſize, which is the act of court, not of the clerk, and, in this caſe, no impropriety on the part of the clerk, that therefore the objection ought to be repelled.

The

The lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the foregoing objection, with what has been declared by the clerk of court, they repel the objection, and ordain the trial to proceed.

(Signed) THO. MILLER, J. P. D.

The lords then proceeded to name the following perſons to paſs upon the aſſize of the ſaid pannel.

Hugh Dalrymple, of Fordell.
Wm. Tytler, of Woodhouſlee.
John Chriſtie, of Baberton,
Alex. Sherif, of Craigleith.
James Finlay, of Wallyfoord.
John Buchan, of Lathem.
Tho. Sharp, younger of Houſton.
Henry Lindeſay, merchant in Edinburgh.
Wm. Maghie, merchant there.
Robert Arthbuthnot, banker there.
Peter Robertſon, goldſmith in Edinburgh.
James Hunter, banker in Edinburgh.
Arch. Hart, merchant there.
John Fife, banker in Edinburgh.
Walter Hamilton, merchant there.

Who being all lawfully ſworn, and no objection on the contrary,

The proſecutor for proof of the libel proceeded to adduce the following witneſſes.

ANDREW WILSON, Wright, in Beith, aged forty years and upwards, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon Tueſday the 24th day of October laſt, he being then employed in ſome part of the late lord Eglintoun's work, attended his lordſhip from Eglintoun to Ardroſſan and Fairly, where his lordſhip intended to go—That his lordſhip was alſo attended that day by John Milliken, John Hazle, John Cooper, and James Hutcheſon, his lordſhip's ſervants. That they left Eglintoun after breakfaſt, and ſtopt ſome time at Parkhouſe, to the weſt, or northweſt of Saltcoats, where they were joined by Alexander Bartleymore,

he thought that the pannel ſeemed to be in anger at this time; but as he was not acquainted with the man before, he can ſay nothing further upon the appearance of his anger. And further depones, That when Campbell uſed the above words, and when my lord was ſtill advancing, he heard the pannel ſay, "Keep "off my lord, or by God I will ſhoot you." That after this there was ſome words paſt between my lord and the pannel; but as the deponent was then about twenty yards behind my lord, holding his horſe, he did not hear what paſt betwixt them, excepting that he heard ſome mention of property, by both of them, but could make no ſenſe of it. That at this time Alexander Bartleymore was come up, and he heard him ſay to the pannel "For God's ſake, Mr. Campbell, "deliver up your gun to my lord;" but did not hear what anſwer the pannel made; and the deponent about the ſame time made the ſame requeſt to the pannel to deliver up his gun to my lord, but either he did not hear him or he made no anſwer. Depones, That during all the time of the pannel's retreating and pointing the gun, as above deſcribed, he always had his thumb upon the cock, at leaſt ſo often as the pannel was in ſuch a ſituation as the deponent could obſerve it, and always obſerved the gun pointed towards my lord, as above deſcribed: and further depones, That when the pannel was retiring and my lord advancing, in the manner above deſcribed, the pannel fell backwards by a ſtone upon which he ſtruck his foot, by which the gun was raiſed paſt the perpendicular, and rather pointing backwards from my lord, the pannel being then lying upon his back: upon which my lord ſtopt for a little, and then moved his left foot as if intending to paſs by Mr. Campbell's feet; upon which the pannel raiſed himſelf upon his elbow, pointed the gun at my lord Eglintoun, and fired it into his body; and that my lord, at the time he received the ſhot, was not above three or four yards from the muzzle of the gun. That the

ſhot

ſhot entered his left ſide, owing, as he apprehends, to the poſture his lordſhip was in by the movement he made as above-deſcribed—Depones, that my lord walked ſome ſteps after receiving the ſhot towards the ſhore, with his hand upon the wound; and as he paſſed near to the deponent, he looked to him and ſaid, he was gone—That preſently after he ſaw the pannel engaged with John Milliken, and endeavouring to wreſt out of his hands the gun which Milliken had brought from my lord's coach—That he had not obſerved this gun before that time.—That, upon obſerving this ſtruggle, he called to Bartleymore to go to Milliken's aſſiſtance, for, that that man would ſhoot more of them; which Bartleymore accordingly did, and prevented the pannel's getting poſſeſſion of the gun. That the ſervants, and the deponent, afterwards tied the pannel's hands, and before this time the deceaſed lord called out to his ſervants, "Don't "uſe him ill."—That the deponent deſired the pannel to go towards my lord, who was then lying upon the ground, with his ſervants about him.—That Campbell accordingly walked up, and my lord looking at him ſaid "I would not have ſhot you, ſuppoſe "you have ſhot me," and again repeated—"I would "not have ſhot you."—Depones, That at the time that the pannel fell backwards the deponent thought my lord might have taken the gun from him, becauſe he was ſo near the pannel, and the pannel was ſome time before he recovered himſelf; but he heard no body adviſe my lord to make uſe of that opportunity of ſeizing the gun. Depones, That after aſſiſting to carry lord Eglintoun to his coach, the deponent, with one John Hamilton, who had joined them, after my lord had got into the coach, conducted the pannel as a priſoner to Saltcoats. That upon their way thither the deponent aſked the pannel what ſhot his gun was charged with.—To which the pannel anſwered "It did not ſignify, as *he* had got as much as would "do for him if he were all the earls in Scotland."

But upon the deponent's ſaying that he might ſatisfy him ſo far as to tell him what the gun was loaded with, he ſaid it was loaded with ſmall ſhot.—That the deponent afterwards aſked him if he was not ſorry for what he had done; anſwered "No, for I will yield "my gun to no man, and would rather yield my life;" and thinks he added theſe words "That if it was to "do he would do it again rather than part with his "gun; for that he would rather part with his life "than his gun;" and he further added, "That if "lord Eglintoun's gun had not been wrong he would "probably have ſhot another." And being interrogate for the pannel, depones, That when my lord was advancing upon the pannel, he frequently obſerved his lordſhip turning from the one ſide to the other, in order, as he underſtood, to avoid the direction of the pannel's gun, and he as often obſerved the pannel change the direction of the gun ſo as to keep it pointed at the earl: and being deſired to explain further in what manner the gun was pointed towards the earl, he again deſcribed it before the jury as raiſing the butt-end of the gun a little above his haunch, and the muzzle of the gun a little upwards, pointing towards the earl. And further depones, That when the pannel fell backwards over the ſtone, he ſaw his heels riſe from the ground by the violence of the fall; and depones, that after the earl firſt accoſted the pannel, the pannel retired, as he thinks, about forty yards ſtraight backwards.—But that it would have been more by his retiring ſometimes ſideways—Depones, that when the earl received the ſhot, the deponent was above twenty yards from him, holding the horſe, which the earl had rode, he himſelf being mounted on his own horſe. Depones, that he did not ſee the pannel riſe from the ground after the earl received the ſhot, but afterwards he ſaw the pannel's gun lying upon the ground near the place where he had fallen.—That he ſaw no ſtrokes given by any perſon to the pannel, except one by John Milliken,

and

and at that time he apprehended that the pannel had wreſted, or nearly wreſted, the earl's gun out of Milliken's hands, which he could not exactly obſerve, as Milliken was betwixt him and the pannel; but conjectured it to be ſo from Millken's giving the above blow: and depones, That, being at the diſtance abovementioned, he neither obſerved the pannel cock the gun, or draw the trigger. And being interrogate by one of the jury, whether he heard lord Eglintoun call the pannel a ſcoundrel, raſcal, or give him any bad names, or curſe or damn him, from the time that my lord firſt accoſted him? depones, That he did not. Depones, That ſome time after my lord had accoſted the pannel, and demanded the pannel's gun; and he had refuſed to deliver it, my lord ſeemed to be in a paſſion. Depones, That when the pannel was carried to Saltcoats his hands were tied behind his back, and he obſerved a little blood upon his brow, but he obſerved no wound. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God—And further depones, that he did not obſerve when the gun was brought from lord Eglintoun's coach; that after his lordſhip received the ſhot he kept his eye cloſe upon him, and did not obſerve ſaid gun till he ſaw Milliken and the pannel ſtruggling about the gun, as above deſcribed; and that Milliken that time was about twelve yards diſtant, as he thinks, from the place where the earl received the ſhot: and this is alſo truth as he ſhall anſwer to God.

(Signed) ANDREW WILSON.

THO. MILLER.

JOHN HAZLE, late ſervant to the deceaſed Alexander earl of Eglintoun, aged about twenty-two years, married, who being ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That he was ſervant to the deceaſed earl of Eglintoun in the end of October laſt, and attended him when his lordſhip ſet out from his own houſe in his coach, with an intention to go to Southennan. That having come to Parkhouſe the earl came out of his coach, and went into his ſtables to look at his horſes, and then went back to his coach, and proceeded to go on in the above road: and being about a quarter of a mile from Parkhouſe, ſome of his ſervants informed him, That they ſaw two men upon his lordſhip's grounds, and one of them had a gun. After which another ſervant, as the deponent thinks Alexander Bartleymore, ſaid to my lord, that one of them was that Campbell, meaning the pannel.---After which my lord came out of his coach, and mounted the horſe which the deponent was leading, and rode towards the two men; and Andrew Wilſon followed him, and the deponent a little behind. When my lord came up to the pannel, he aſked him to give up his gun, which the pannel refuſed.---At leaſt theſe were the firſt words the deponent heard paſs betwixt them; though, as my lord was with the pannel ſome little time before, other words might have paſt which the deponent did not hear.—That my lord having ſtept forward to lay hold of the gun, the pannel ſtept back, holding the gun in his hand pointed towards my lord's body, and ſaid, if he did not ſtand off he would ſhoot him.—That he did not obſerve whether the gun was cocked or not, but he obſerved the pannel's finger upon the trigger.—That the earl ſaid, if he had his gun there he believed he could ſhoot as well as the pannel, and then ſent the deponent for the gun; and the deponent went and took the gun out of the coach, and delivered it to John Milliken, and bid him ride as faſt as he could with it to my lord; and the deponent followed

him

him on horſeback. And when he was come up, he obſerved the pannel retiring backwards with his gun in his hand, and his finger on the trigger, and the muzzle pointed to the earl; and the pannel, having kicked his heel againſt a ſtone, fell backwards, and the gun flew up and his heels flew up.—That the earl upon that did not advance, but ſtood ſtill and ſmiled; after which the pannel raiſed himſelf, leaned upon his right elbow, and then levelled his gun at my lord's body, and then ſtopt ſome time: and my lord was proceeding to go round the pannel's feet towards his head, as he thinks, and was about a yard and a half, or two yards, from the muzzle of the gun; and he ſaw the pannel point the gun at my lord, and ſaw the gun fired into my lord's body; but did not obſerve whether the pannel's finger was upon the trigger or not. After which my lord ſaid, that he was gone, and moved a little way from the place and laid himſelf down upon the ground.—That after this the pannel roſe up, and went to John Milliken, and took my lord's gun from him, and pointed it at the deponent to ſhoot him, and then pointed it to John Milliken. And the deponent knows that the earl's gun was not charged at the time, but it was primed by Milliken after he took it out of the coach.—That Alexander Bartleymore and Andrew Wilſon came to John Milliken's aſſiſtance, and threw down the pannel to the ground, and took the earl's gun from him; and John Milliken gave him two or three ſtrokes; and he heard the earl cry out, that they ſhould not hurt the pannel, but ſecure him, and let the law take place. After which John Milliken was diſpatched to Saltcoats for a doctor, and Bartleymore and Wilſon tied the pannel's hands behind his back with a garter, and brought him to the place where the earl was; and he heard his lordſhip ſay to the pannel, "Campbell, you have "ſhot me, which I would not have done to you." To which the pannel made no anſwer. That the earl had no arms, nor ſtaff, nor whip, nor any thing elſe

in

in his hands, from the time he firſt came up to the pannel, 'till he received the ſhot. And that he did not grapple with the pannel, or uſe any harſh expreſſions to him. That the earl upon this went into the carriage, and the deponent went to Irvine for a doctor, and heard no more of what paſt. And being interrogate for the pannel, depones, That the deponent was ſitting on horſe behind my lord about fifteen yards or ſo when the gun was fired.—And being interrogate how he obſerved my lord ſmiling at Campbell's fall, depones, That my lord turned about towards the deponent, and he ſaw him ſmile. And being further interrogate, When he ſaw Milliken prime the gun, depones, that it was after he carried it down to the ſands. And being further interrogate, Whether any powder and ſhot was brought by the deponent out of the coach? depones negative. But he does not know whether Milliken had any ſhot with him. —And that Milliken was about twenty or thirty yards from the earl when he primed the gun. And being further interrogate for the pannel, depones, That the earl's gun was brought within twenty or thirty yards of his lordſhip when the pannel fell: and that it was about the ſame diſtance when the pannel's gun was fired. And depones, That he is now ſervant to Archibald earl of Eglintoun, but is ſoon to leave him. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God. And depones he cannot write.

(Signed) JAMES FERGUSON.

JOHN MILLIKEN, late ſervant to the ſaid deceaſed Alexander earl of Eglintoun, now reſiding at Eglintoun, aged forty years, unmarried, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That a ſervant of the late lord Eglintoun's, named John Hazle, came riding back from the earl at the time and place mentioned in the indictment, and deſired the deponent to carry my

my lord Eglintoun's gun to him, which happened to be in the coach: that the deponent did accordingly; but before he had time to charge the gun, which he knew was not charged, he heard and saw the shot from the pannel's gun, by which his master was killed.——That he knows my lord's gun was not charged, because it was his the deponent's business to look after my lord's arms, and to carry the ammunition. Depones, That when he came near the earl as aforesaid, he heard the pannel say, That by God he would shoot the earl, if he were the best earl in the nation; and adds, That he heard no words from the earl at that time.—Depones, That when the earl was shot, he, the deponent, was at the distance of twenty yards from him. Depones, that he went up to my lord after he was shot, and my lord said, "I am done "for." That next he attacked the pannel, struck him, and threw him down. That the pannel attempted to wrest the gun out of his hands, and did not succeed, though he was very near it. The earl at the same time called to the deponent to let the pannel alone. Depones, That Alexander Bartleymore assisted him in the struggle with the pannel. And that the deponent was soon thereafter sent for a surgeon to his master: but before he went he left his master's gun lying upon the ground. That when he returned with the surgeon, he saw the pannel with his hands tied behind his back; and that they were not so tied when he went for the surgeon. And upon an interrogatory in behalf of the pannel, depones, That he was about to charge my lord's gun, when the shot from Campbell's gun went off. *Causa scientiæ patet.* And this is the truth, as he shall answer to God.

(Signed) JOHN MILLIKEN.

HENRY HOME.

ALEX-

ALEXANDER BARTLEYMORE, in Parkhouſe of Ardroſſan, aged thirty-ſix years, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon the twenty-fourth day of October laſt the deponent was attending the late earl of Eglintoun; and having paſſed a place called Parkhouſe at about a quarter of a mile diſtance therefrom, a man was obſerved in the fields with a gun, attended by another without a gun, both of them being upon my lord's grounds. That my lord having enquired who it was that was carrying the gun, the deponent told him that it was the pannel. That upon this my lord, along with Andrew Wilſon and John Hazle, went towards theſe men; my lord having come out of his coach, and got on horſeback for that purpoſe. That the deponent ſtaid by the coach for ſome time, but thereafter came up to where my lord was, and obſerved the pannel preſenting his gun at my lord; and the deponent begg'd the pannel, for God's ſake, to give his gun to my lord Eglintoun; but the pannel ſaid he would not, for he had a right to carry a gun. That the earl ſaid to him, That he might have a right to carry a gun, but not upon his lands, without his liberty.—That the pannel upon this ſaid to the earl, I beg your lordſhip's pardon: or, I beg your pardon.—That at this time lord Eglintoun was diſmounted from his horſe, and advancing nearer the pannel, who again was retiring ſometimes backwards, at other times ſideways, having his muſket ſtill pointed at the earl. But the deponent did not obſerve whether he had his hand upon the cock or not; neither did the deponent hear any threatnings uſed by the pannel againſt the earl. Depones, when the pannel was retreating, he fell cloſe by where the deponent was ſitting on his horſe, and by his fall frightened the deponent's horſe, ſo that the horſe reeled a little; during which time the deponent did not obſerve the pannel, but immediately thereafter, having got his horſe ſettled, he ſaw the pannel half

ſitting

ſitting half lying, and ſaw him point his gun towards lord Eglintoun, and immediately fire it.—That at this time lord Eglintoun was within two or three yards of the pannel. That upon this lord Eglintoun gave three or four loud cries, that he was gone. Depones, that the pannel fired his gun without putting it to his ſhoulder, but raiſed the butt above his haunch, and pointed it at the earl. Depones, that he having gone up to give what aſſiſtance he could to the earl, he heard ſomebody cry, that the pannel would ſhoot more people. Upon this the earl deſired the deponent to go and take care of the man, for he had ſhot him already.—That the deponent upon this left the earl, and ſaw the pannel and John Milliken, one of the late earl's ſervants, ſtruggling about a gun; whereupon the deponent ran up, and found the pannel had wreſted the gun from Milliken. Upon which the deponent laid hold of the pannel, threw him down, and took the gun from him. That after this John Milliken continued with the pannel, and kept him on the ground; and thereafter the deponent aſſiſted in tying the pannel's hands behind his back.—Depones, That at this time the deponent ſaid to the pannel, "Is it "not a ſad thing you would not deliver your gun "to lord Eglintoun, but have ſhot him?"—To which the pannel anſwered, "If I have ſhot him, let me "be hanged for it." Depones, That at the time the pannel fired at the earl, his lordſhip had no arms, neither ſtaff nor whip; and the deponent did not ſee him grapple with the pannel, or hear him uſe any harſh expreſſions to him.—And being interrogate upon the part of the pannel, depones, That when he firſt ſaw the pannel as above-mentioned, he was among ſome whins on lord Eglintoun's eſtate, at a conſiderable diſtance from the lands of Montfodd. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God. And being further interrogate upon the part of the pannel, depones, That when the earl received the ſhot, John Milliken was within twenty or thirty yards

of his lordſhip, as the deponent thinks; and that the deponent did not obſerve John Hazle at that time. Depones, That Milliken and Hazle were ſervants to the late earl of Eglintoun, and are ſervants to the preſent earl, as the deponent is alſo. And this is alſo truth.

(Signed) ALEXANDER BARTLEYMORE.
ALEXANDER BOSWELL.

JOHN BROWN, tide-officer at Saltcoats, aged forty and upwards, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon the twenty-fourth of October laſt, the deponent was deſired by the pannel to take a walk with him. That the pannel had a gun, and they paſſed through the grounds of Montfodd, and thereafter croſſed a burn, which is the march between Montfodd and the earl of Eglintoun's property, and went through lord Eglintoun's ground towards the ſea.—That when they were coming along they met with one Mr. Boyes, an exciſeman, who ſaid to them, It ſeemed they did not mind going through incloſures; though at the ſame time the deponent and the pannel had not gone over any dykes, but followed an old kirk-road, there being ſtyles over the dykes to ſuffer people to paſs. Depones, That when they were upon lord Eglintoun's property as aforeſaid, they ſaw a coach not far from Parkhouſe, and ſoon thereafter the earl of Eglintoun came up to them. That when the earl came, he ſaid to the pannel, "Mr. Campbell, why do you carry a "gun upon my grounds, when I took you in a treſ-"paſs before?" And immediately alighted from his horſe, and called to the pannel to deliver him his gun. That the pannel upon this ſaid he was doing his lordſhip no harm, and bid his lordſhip keep off, pointing his gun at my lord.—That the deponent upon this went off, and can give no further account of what

what paſſed. But being interrogate, ſpecially if, while he was preſent, lord Eglintoun uſed any threatenings or bad language to the pannel? depones, he did not. And being interrogate upon the part of the pannel, depones, That he thinks he heard lord Eglintoun deſire one of his ſervants to bring his lordſhip's gun. Depones, That after he had gone off a conſiderable diſtance, he heard the report of a gun. That immediately after this he looked back, and, as he thinks, he ſaw the pannel lying on the ground on his hands, having known him from his cloaths and his white night-cap.—Depones, That the pannel had no dog with him, and ſhot none upon lord Eglintoun's property that day; neither did he upon any other ground; neither did he ſee Mr. Campbell beating buſhes for game. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God.

(Signed) JOHN BROWN.

ALEXANDER BOSWELL.

JOHN MOORE, ſurgeon in Glaſgow, aged forty years, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That the deponent was called upon to ſee my lord Eglintoun at his own houſe that day on which he received his mortal wound, in October laſt. That he came there betwixt eight and nine at night.—That when the deponent entered the room where lord Eglintoun was lying in bed, his lordſhip ſaid, I am glad to ſee you, but you can be of no uſe to me now, for it is all over. That the deponent replied, that he hoped it would not be ſo bad, and wiſhed to ſee the wound. That he examined the wound a little time after, and was immediately convinced that it was mortal. That after this lord Eglintoun deſired the deponent to come towards his bed-ſide and ſit down, and ſaid, I did not deſerve this. I gave no provocation to occaſion or deſerve it. That upon this his lordſhip gave the following detail

of the affair: That he had been going that morning in his coach to Ardroſſan, and was informed by one of his ſervants that a man was ſhooting in ſome of his parks. Upon which he came out of his coach and mounted a led horſe, and coming up to the man who had a gun, he told him, he did not take it well of any perſon to kill his game without aſking his liberty, and deſired the man to deliver up his gun, which he refuſed to do; and his lordſhip inſiſting upon it, the man preſented the piece, and threatened to ſhoot him if he perſiſted. —That his lordſhip ſaid, that he alſo could ſhoot very well, if he was for that: and turning to one of the ſervants, he deſired him to go to the coach and bring his lordſhip's gun, which was there.—That while this ſervant was away his lordſhip continued to expoſtulate with the man, and inſiſted on his delivering up his piece; while the man continued retiring, with his face to my lord, he fell backward over ſome ſtones, and immediately recovering he ſhot his lordſhip. That the deponent here interrupted his lordſhip, and ſaid, probably the gun went off by accident when the man fell? At which his lordſhip replied, ſhaking his head, "No, he fired intentionally;" or words to that purpoſe. That at this time the earl was entirely compoſed, and as ſenſible as ever the deponent had ſeen him. That he talked diſtinctly, and did not utter any thing that ſhowed rancour or reſentment againſt the pannel; and that he was perfectly convinced that he would ſoon die of the wound, and was perfectly reſigned to his fate.—That he died that night a little after twelve o'clock. Depones, That next day he opened the body, and found the bowels very much torn from the left ſide, where the wound was, all the way to the right. —That he found many ſmall ſhot within the belly, ſome of them lodged in the liver.—That the circular wound in the ſkin was about three inches below the navel upon the left ſide, and the wounded bowels could be traced obliquely upwards from the external wound to the liver.—That there was a large quantity

of

of extravasated blood in the belly.—That the deponent was very well acquainted with lord Eglintoun before, and that he is positive that lord Eglintoun died of that wound. *Causa scientiæ patet.* And this is the truth, as he shall answer to God.

(Signed) JOHN MOORE.
JAMES FERGUSON.

Dr. JOHN CUMMING, physician in Irvine, aged fifty and upwards, unmarried, purged of malice and partial counsel, solemnly sworn and interrogate, depones, That upon the twenty-fourth day of October last, he was sent for to visit the deceased Alexander earl of Eglintoun, at his house of Eglintoun, on account of a wound which he had that day received. That when he come to his lordship, he found him in great pain; and he said to the deponent, that he had been murdered by Mungo Campbell, the pannel, in cold blood; for that he had given him no provocation, not having said an uncivil word to him, and having nothing in his hand to hurt him, not even a switch.—That at this time lord Eglintoun appeared to be altogether sensible and composed.—Depones conform to the preceding witness, with respect to the nature of the wound; and that it was the occasion of lord Eglintoun's death; and that he was present next day when lord Eglintoun's body was opened. *Causa scientiæ patet.* And this is truth, as he shall answer to God.

(Signed) JOHN CUMMING.
ROBERT BRUCE.

GEORGE HUTCHINSON, lieutenant and adjutant of the fourth regiment of foot, aged twenty-nine years, unmarried, solemnly sworn, purged of malice and partial counsel, and interrogate, depones, That about the beginning of October last, the deponent

nent happened to be in company with Mungo Campbell, the pannel, in a houſe of the town of Saltcoats, when the converſation turning on the ſubject of ſport, the pannel ſaid that lord Eglintoun had challenged him for ſhooting on his grounds; and thinks he ſaid that his lordſhip had done ſo oftener than once, and, ſo far as he can remember, thinks it was twice; and that his lordſhip had threatened to take his gun from him, but had not perſiſted in demanding it; and that if he had, the pannel did not know what the conſequence might have been; perhaps he might have fired it, or words to that effect; and added, that he would allow it was a treſpaſs to ſhoot without leave, for which he might be proſecuted; but he knew no right lord Eglintoun had to take his gun on that account: that as an officer of exciſe he looked upon himſelf as entitled to carry arms in the proſecution of his duty. Lieutenant Joſeph Knight was in company with the deponent and Mr. Campbell at this time. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) G. HUTCHINSON.
ROBERT BRUCE.

JOSEPH KNIGHT, lieutenant in the ſaid fourth regiment of foot, aged twenty-nine, unmarried, purged of malice and partial counſel, and ſolemnly ſworn and interrogate, depones, That upon the third day of October laſt, the deponent and lieutenant Hutchinſon, the preceding witneſs, happened to be in company with Mungo Campbell, the pannel, in the town of Saltcoats; and the converſation happening to turn upon ſport, and ſome of them having aſked if there was good game in that neighbourhood, the pannel anſwered that there was, for that moſt of the grounds about the town belonged to lord Eglintoun, and he was ſtrict in preſerving the game. That the pannel alſo ſaid, he had been ſeverely challenged by lord Eglintoun for ſhooting a hare; and that his lordſhip

had on that occaſion either threatened or attempted to take his gun from him, but did not perſiſt in it; and that the pannel had then ſaid to lord Eglintoun, that he would rather die as part with his gun.—That Mr. Campbell further ſaid, and ſwore to it, that if lord Eglintoun had perſiſted to take his gun from him, he would have ſhot him; for that he was an old man, and his life was not much worth, or words to that purpoſe. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God. And further depones, That on the above occaſion the pannel ſaid, that as he was an exciſe-officer, he had a right to carry arms, and would ſhoot any perſon who would attempt to take them from him. That the deponent does not exactly remember whether the pannel only ſaid this to him and lieutenant Hutchinſon, or if he told them that he had ſaid ſo to lord Eglintoun, when demanding the gun as aforeſaid. And this is alſo truth.

(Signed) J. KNIGHT.
ROBERT BRUCE.

JOHN HAMILTON, maſon, in New-houſe, in the pariſh of Ardroſſan, aged fifty-three years, married, purged of malice, and partial counſel, ſworn and interrogate, depones, That upon the twenty-fourth of October laſt, immediately after the late Earl of Eglintoun had received the wound of which he died, the deponent came down to the ſhore where it happened, and aſſiſted Andrew Wilſon, a preceding witneſs, in conducting the pannel to Saltcoats.—That when they were upon the road, the deponent aſked the pannel how that unlucky accident had happened; to which he anſwered, that lord Eglintoun had come to him and demanded the gun, which he had refuſed: that his lordſhip having advanced up to him, had inſiſted for delivery of the gun; upon which he had retreated, and making his retreat, had fallen on the ground. That before this, lord Eglintoun had ſent a ſervant of his

his for his gun; and he thought his life was as good as lord Eglintoun's, and he ſhot him before the gun came.—That the deponent having ſaid to the pannel, that he hoped he was miſtaken, and that poſſibly he might be but ſlightly wounded; to which the pannel replied, that he had received the ſhot when he was within three yards of him, and that he could not live if he was all the lords of Scotland or of Britain: that thereafter the deponent ſaid to the pannel, If you could obtain words of lord Eglintoun, as you ſay that he is a dying man, perhaps in cool blood he might forgive you, which would be a great honour to you. To which the pannel anſwered, that it would avail him nothing, or ſtand him in no ſtead. And further depones, that he thinks that the pannel told him, that he had fallen to the ground before lord Eglintoun ſent for his gun. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) JOHN HAMILTON.
GEO. BROWN.

SAMUEL MITCHEL, ſhoemaker, in Saltcoats, aged fifty and upwards, married, purged of malice and partial counſel, ſolemnly ſworn and interrogate, depones, That upon the twenty-fourth of October laſt, Andrew Wilſon, a preceding witneſs, brought the pannel to the deponent, at the deponent's houſe in Saltcoats, John Hamilton and another perſon being along with him: and that the pannel had then his hands tied behind his back.—That Andrew Wilſon ſaid he had orders to deliver him to the deponent, that he might carry him priſoner to the town of Irvine, for the crime of ſhooting lord Eglintoun.—That the deponent having aſked Andrew Wilſon how that had happened, the ſaid Andrew Wilſon ſaid he was afraid lord Eglintoun was gone, and immediately thereafter the pannel ſaid, "By God it is fact, "I have ſhot lord Eglintoun, and he is gone if he "was all the lords in Scotland."—That the deponent

nent convened a party accordingly, and carried the pannel priſoner to Irvine.—That when they were upon the road to Irvine, the deponent ſaid to the pannel, "that as lord Eglintoun was a young healthy man, "there was reaſon to hope that he might recover." To which the pannel anſwered, "that it was im-"poſſible—that he had received the whole ſhot into "his body, and that he was gone if he was all the "lords in Europe." Depones, That the deponent having ſaid it was pity ſuch an unlucky accident ſhould have happened to ſuch a nobleman, the pannel anſwered, "There is no help for it now; it is only an "old gauger dying two or three years ſooner for a "lord." *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) SAMUEL MITCHELL.
GEO. BROWN.

CHARLES HAMILTON, of Craighlaw, provoſt of Irvine, aged ſixty years, unmarried, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That upon the twenty-fourth of October laſt, Mungo Campbell, the pannel, was brought to Irvine, and preſented to the deponent as chief magiſtrate of that burgh, in order to be committed to priſon, for ſhooting the late Earl of Eglintoun. That the deponent, in proſecution of his duty, took the examination of the pannel touching the circumſtances of that affair, which he committed to writing; and which declaration was wrote, at his direction, by James Cunningham, and was ſubſcribed by the pannel and the deponent. And being now ſhown to him, he depones it is the ſame declaration which was made by the pannel, taken down in writing, and ſubſcribed by the pannel and him as abovementioned. That it was emitted by the pannel voluntarily and freely; and after being read over to the

pannel, was ſubſcribed by him and the deponent. And the ſaid declaration is now marked by the deponent and lord juſtice-clerk, by their ſubſcribing the ſame. And further adds, That after the declaration was read over to the pannel, holding up both his hands, he ſaid, That it was the truth, as he ſhould anſwer to God. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) CHAR. HAMILTON.
THO. MILLER.

Mr. WILLIAM DUFF, advocate, ſheriff-depute of Air-ſhire, aged years, married, purged of malice and partial counſel, ſworn, and interrogate, depones, That upon the twenty-ſeventh of October laſt, the pannel being then committed priſoner to the Tolbooth of Air, for the murder of the late earl of Eglintoun, the deponent, in the courſe of his duty, took the pannel's examination touching the circumſtances of that caſe, and committed the ſame to writing, which was dictated by him, as expreſſed by the pannel, and was written by John Murdoch, the ſheriff-clerk-depute. That what was therein taken down was emitted by the pannel freely and voluntarily; and being read over to the pannel, was ſubſcribed by him.—That at the ſame time another declaration, which the pannel had emitted before Charles Hamilton, provoſt of Irvine, was read over to the pannel; and he acknowledged that it was the declaration which he had emitted before the ſaid Charles Hamilton: and both theſe declarations being now ſhown to the deponent, depones, that they are the ſame with thoſe above deponed to, ſubſcribed by the pannel, by provoſt Hamilton and the depute, as above deponed to. And the deponent has now ſubſcribed both theſe declarations as herein referred to. And the declaration firſt above-mentioned, bearing date the twenty-ſeventh of October, is alſo ſubſcribed by lord juſtice-

clerk, the other declaration of the twenty-fourth of October being already ſigned by him. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God.

(Signed) WILLIAM DUFF.
THO. MILLER.

JOHN MURDOCH, ſheriff-clerk-depute of Air, aged twenty-nine years, married, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That he was preſent with Mr. Duff upon the twenty-ſeventh of October laſt, when the pannel emitted a delaration touching the murder of lord Eglintoun. That he wrote the ſaid declaration, which was dictated by Mr. Duff; and concurs with Mr. Duff, in proving that declaration, and likeways the former declaration, which had been emitted by the pannel before Charles Hamilton, provoſt of Irvine: and both declarations being now ſhown him, depones that they are the ſame with thoſe above deponed to. And both declarations are now ſubſcribed by the deponent as herein referred to. *Cauſa ſcientiæ patet.* And this is the truth as he ſhall anſwer to God.

(Signed) JOHN MURDOCH.
THO. MILLER.

The two declarations mentioned in the aforeſaid depoſition were read over in the preſence of the court and jury: and of which the tenors follow:

FIRST DECLARATION.

Irvine, 24th Oct. 1769.

IN preſence of Charles Hamilton, Eſq. of Craighlaw, provoſt of the burgh of Irvine, one of his Majeſty's juſtices of the peace for the ſhire of Air, compeared Mungo Campbell, officer of exciſe at Saltcoats, who being examined, declares, That this

day in the forenoon, or about mid-day, he was walking upon the ſhore betwixt Ardroſſan Park-dyke and Montfodd-burn, with his gun in his hand. That lord Eglintoun came riding up to him, and diſmounted, and aſked the declarant to deliver up his gun; which he refuſed to deliver, and begging my lord pardon if he had done him an injury. That my lord again and again required the gun, and he refuſed; in the mean time retiring from my lord's taking the gun from him, and telling his lordſhip that he had no right to take the gun from him, nor would he give it; but if he had done any wrong, the law was open, and he was willing to anſwer to the law for it. That upon this my lord called to his ſervant to bring him a gun, for he could ſhoot as well as the declarant: while the ſervant was bringing up the gun, the declarant continuing to retire, and having his gun cocked, and his hand at the trigger, he fell back, by a ſtone which he imagined took his foot; and thereupon he ſhot lord Eglintoun. That whenever the declarant got up, he was attacked by two of lord Eglintoun's ſervants; from one of them he twiſted his lordſhip's gun, and had not both the ſervants engaged him cloſely, he does not know what might have been the conſequence, or that he might not have ſhot one of them too, upon his own defence. That the declarant threw away his own gun upon its being diſcharged, and lord Eglintoun's ſervant attacking him. That Mr. Brown, tide-waiter in Saltcoats, Andrew Wilſon, wright in Beith, Alexander Bartleymore in Park-houſe, and two of lord Eglintoun's ſervants, whoſe names he does not know, were preſent during the whole quarrel.

(Signed) MUNGO CAMPBELL.
CHAR. HAMILTON, J. P.

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SECOND DECLARATION.

At Air, the twenty-ſeventh day of October, ſeventeen hundred and ſixty-nine years;

Which day Mungo Campbell, officer of exciſe in Saltcoats, preſent priſoner in the Tolbooth of Air, being brought before Mr. William Duff, advocate, ſheriff-depute of the ſhire of Air, and the declaration which he emitted on Tueſday the twenty-fourth of October inſtant, before Charles Hamilton of Craighlaw, preſent provoſt of the borough of Irvine, and one of his Majeſty's juſtices of the peace for the ſhire of Air, being read over to him, declares, That he voluntarily emitted ſaid declaration, and ſigned the ſame, and ſtill adheres to it, with this addition; That he ſet out from Saltcoats on laſt Tueſday forenoon, in company with —— Brown, tide-waiter in Saltcoats: that they went together the length of Montfodd-bank, and then came down the burn a little way with an intention of finding a wood-cock. That he croſſed ſaid burn, which divides lord Eglintoun's property from Montfodd, and went to the ſea-ſhore, and was walking along the ſhore within the ſea-mark, looking for a ſhot of plover, when lord Eglintoun came riding up to him; and having diſmounted, demanded the gun, as mentioned in his former declaration. That lord Eglintoun uſed ſeveral harſh expreſſions to him, but no threatenings; nor did the declarant underſtand that he had any further intention than to take the gun from him. That upon lord Eglintoun's demanding his gun, he retired from him, and cocked the gun, and continued retiring for forty or fifty yards, as he thinks, till he fell down, as mentioned in his former declaration. That when he was lying upon the ground, lord Eglintoun came up to him, and graſped at his gun, at which time the gun went off, as mentioned in the ſaid declaration. And this he declares to be truth. This declaration, wrote by

by John Murdoch, ſheriff, clerk-depute of Airſhire, is emitted and ſubſcribed by the ſaid Mungo Campbell, place, day, month, and year of God, aforeſaid,—before theſe witneſſes, Ebenezer Goldie, writer in the ſheriff clerk's office, at Air, and the ſaid John Murdoch.

(Signed) MUNGO CAMPBELL.
(Signed) WM. DUFF.
JOHN MURDOCH, witneſs.
EBEN. GOLDIE, witneſs.

Whereupon the dean of faculty, in behalf of the proſecutor, declared he cloſed his proof.

The following witneſſes were then adduced on the part of the pannel for his exculpation.

But before they were adduced, the counſel for the pannel opened the firſt article of their evidence, which was, That the pannel had a licence for ſhooting upon the grounds of the following perſons in the neighbourhood of Saltcoats, viz. Dr. Hunter of Montfod, John Alexander of Boydſtone, John Reid of Seabank, John Hamilton of Grange, and Patrick Warner of Ardier.

The dean of faculty, as counſel for the proſecutor, rather than detain the court in a proof of facts, which are in no degree material, agrees to hold it for proven, that the five perſons above condeſcended upon, gave ſuch licences to the pannel to ſhoot upon their grounds; but denies that they themſelves had the qualification required by law to entitle them to kill game, or to grant ſuch licences to the pannel.

(Signed) ALEX. LOCKHART.

And a licence from the Earl of Loudon, bearing date the Twenty-eighth of July, One thouſand ſeven hundred ſixty-four, empowering the pannel to hunt upon his lordſhip's muir of Muirkirk, with dog and gun only, being produced, the counſel for the proſecutor admitted, that the ſame was ſubſcribed by the Earl of Loudon, and the ſame was read to the jury.

(Signed) HENRY DUNDAS.

And another licence by Hugh Campbell, factor to the Earl of Marchmont, to the pannel, for ſhooting upon his lordſhip's ground, bearing date the Thirteenth day of April, One thouſand ſeven hundred fifty-two, being alſo produced; the counſel for the proſecutors repreſented, that they were unac-

unacquainted with the hand-writing of the perſon whoſe ſubſcription it bears; but, to ſave time to the court and jury, they were willing to admit the repreſentation of the counſel for the pannel as evidence, that this licence was really granted of the date it bears.

(Signed) HENRY DUNDAS.

The counſel for the pannel, in anſwer to the quality added to the firſt admiſſion by the counſel for the proſecutor, do ſay, that by the law and practice of this country, every landholder has a right to ſhoot, and to grant licences for ſhooting upon his own ground.

The counſel for the pannel opened, as another matter of evidence in his exculpation, that lord Eglintoun was frequently in uſe to proſecute poachers, but that he never proſecuted the pannel as a poacher, and offered to prove the ſame.

The counſel for the proſecutor anſwered, that, to their knowledge, the pannel never was proſecuted by lord Eglintoun as a poacher, though they believe that lord Eglintoun frequently proſecuted poachers.

(Signed) HENRY DUNDAS.

DAVID STIRRAT, maſon, in Gourack, aged forty-ſix years, married, purged of malice and partial counſel, ſworn, and interrogate, depones, That about fifteen years ago, when the deponent one day was carrying his gun upon the late lord Eglintoun's ground near Saltcoats, he ſaw a gentleman, whom he did not know, riding towards him, whereupon he hid his gun in a buſh. That the gentleman, whom he ſaw afterwards to be the earl of Eglintoun, having come up, knocked the deponent down with his whip; that the deponent having recovered, was aſked where his gun was: whereupon the deponent went to the buſh, took it out, and gave it to the earl, and no more happened; That the deponent was a little ſtupified that day with the blow, but did not feel it after, and that he never got back his gun, and that the gun was worth about twelve ſhillings, as the deponent thinks. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) DAVID STIRRAT.
ALEX. BOSWELL.

JAMES

JAMES CRAWFURD, late tenant in Caldcoats, now in Waſhwalls, aged forty and upwards, married, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That four years ago the late earl of Eglintoun told him that he had taken a gun from a lad in the Muir.—That the lad had ſtruggled to keep the gun, and that he had given him a ſwitch or two in taking it from him; That the earl delivered this gun to the deponent, and deſired him to reſtore it to the lad's brother, to whom he underſtood it belonged. That the deponent having diſcovered that the gun belonged to John Brown, the brother of Thomas Brown, gave the gun to the ſaid John Brown, in Blacklaw. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) JAMES CRAWFURD.
ALEX. BOSWELL.

THOMAS BROWN, younger brother to John Brown, in Blacklaw, aged twenty-two years, unmarried, purged of malice and partial counſel, ſworn, and interrogate, depones, That about four years ago, when the deponent was going with a gun, within half a mile of his own houſe of Blacklaw—a gentleman, whom the deponent did not know, came up to him, and inſiſted to have his gun. That the deponent ſtruggled to keep it, and the gentleman to take it; and when ſo ſtruggling the gentleman gave him a blow or two with his fiſt upon his head, but not very ſore, and took away the deponent's gun.—That the deponent got his brother, John Brown, to go and endeavour to get back the gun; and his brother returned with it, telling him that he had got it from the immediate preceding witneſs, James Crawfurd; and depones that he never employed Dr. Cumming in Irvine, or any body elſe to cure him, as he had no occaſion. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) THOMAS BROWN.
ALEX. BOSWELL.

The counsel for the pannel in the last place proposed to lay before the jury a printed copy of the first draught of the indictment against the pannel; wherein they say, that several facts are admitted, which are suppressed, or differently stated, in the indictment now under trial.

To which it was answered by the counsel for the prosecutors, That the piece of paper referred to is not the indictment which was ever intended to be served upon the pannel, as is evident from neither witnesses or jury being subjoined to the same. It is nothing more but one of four copies of a rough draught of the indictment, thrown off for the purpose of being submitted to the counsel for the prosecutor, for their consideration; and that accordingly it was considered by them. It was amended in such a manner as appeared to them most agreeable to the information they had received, and most calculated to give a fair trial to the pannel. That this is the real state of the fact, which the counsel for the prosecutors have no objection should be admitted in the record; but they do object to your lordships against any other evidence being adduced relative to this matter, because they consider the attempt as highly irregular; and which, if tolerated, might be attended with the most dangerous consequences in the conduct of criminal business in this country, and that confidence which the law countenances, as absolutely necessary betwixt counsel and their employers.

At 12 o'clock at night of the 26th of February.

The procurators for the pannel thereupon declared they closed their proof in exculpation.

Whereupon the evidence on the part of the prosecutors was summed up to the jury by Mr. Alexander Lockhart, and on the part of the pannel by Mr. David Rae, advocate.

Betwixt the hours of four and five of the clock of the morning of Tuesday *the 22d day of* February.

The lord justice-clerk, and lords commissioners of justiciary ordain the assize instantly to inclose in this place, and to return their verdict in the same place this evening, at six o'clock; continue the diet against the pannel, and whose other diets of court till that time; ordain the fifteen assizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to prison.

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſeptimo die Februarii, milleſimo ſeptingenteſimo & ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN, MUNGO CAMPBELL, officer of exciſe at Saltcoats in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The perſons who paſt upon the aſſize of the ſaid pannel, returned the following verdict.

At Edinburgh, the twenty-ſeventh day of February, one thouſand ſeven hundred and ſeventy years.

THE above aſſize having incloſed, made choice of the ſaid Hugh Dalrymple, of Fordell, to be their chancellor, and William Tytler of Woodhouſlie to be their clerk; and having conſidered the criminal indictment, raiſed and purſued at the inſtance of Archibald earl of Eglintoun, brother-german to the deceaſed Alexander earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, eſquire, his Majeſty's advocate for his Majeſty's intereſt, againſt Mungo Campbell exciſe officer at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel; with the interlocutor on the relevancy thereof pronounced by the lord juſtice-clerk and

and lords commiſſioners of juſticiary, the depoſitions of the witneſſes adduced by the proſecutors for proving their libel, and the declarations of the pannel libelled on, together with the admiſſions made by the procurators for the proſecutors, and the depoſitions of the witneſſes adduced by the pannel for his exculpation, They, by a great plurality of voices, find the pannel, Mungo Campbell, GUILTY. In witneſs whereof their ſaid chancellor and clerk, have ſubſcribed theſe preſents in their names, and by their appointment, place and date foreſaid.

(Signed) HUGH DALRYMPLE, Chanc.
WILLIAM TYTLER, Clerk.

THE lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the verdict of aſſize, dated and returned this twenty-ſeventh day of February, againſt Mungo Campbell officer of exciſe in Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel; whereby the aſſize by a great plurality of voices, find the ſaid Mungo Campbell, pannel, guilty; They, in reſpect thereof, by the mouth of Edward Hay, dempſter of court, decern and adjudge the ſaid Mungo Campbell to be carried from the bar back to the Tolbooth of Edinburgh, therein to remain, and to be fed upon bread and water only, in terms of the act of parliament paſt in the twenty-fifth year of the reign of his late majeſty king George the ſecond, entitled "An "act for preventing the horrid crime of murder," until Wedneſday the eleventh day of April next to come, and upon that day to be taken forth of the ſaid Tolbooth, and carried to the common place of execution in the Graſs-market of Edinburgh; and then and there, betwixt the hours of two and four o'clock in the afternoon of the ſaid day, to be hanged by the neck by the hands of the common executioner, upon a gibbet, until he be dead; and his body thereafter to be delivered to Doctor Alexander Monro,

professor of anatomy in Edinburgh, to be by him publickly dissected and anatomized, in terms of the said act; and ordain all his moveable goods and gear to be escheat and inbrought to his Majesty's use: which is pronounced for doom.

Signed { THO. MILLER. ALEX. BOSWELL. HENRY HOME. JAMES FERGUSON. GEO. BROWN. ROBERT BRUCE.

INFOR-

INFORMATION

FOR

ARCHIBALD Earl of EGLINTOUN,

AND

JAMES MONTGOMERY, Esq.

His Majesty's Advocate, for his Majesty's Interest;

AGAINST

MUNGO CAMPBELL,

Excise-officer at Saltcoats, in the County of Air,

Now PRISONER in the Tolbooth of Edinburgh.

PANNEL.

INFORMATION

FOR

ARCHIBALD Earl of Eglintoun, and JAMES MONTGOMERY, Esquire, his Majesty's Advocate, for his Majesty's Interest;

AGAINST

MUNGO CAMPBELL, Excise-officer at Saltcoats, in the County of Air, now Prisoner in the Tolbooth of Edinburgh, Pannel.

THE said Mungo Campell stands indicted and accused of the crime of *Murder*, "In so far as the deceased Alexander Earl of Eglintoun having, the time libelled, gone out from his house of Eglintoun, in the county of Air, in his coach, to look at some of his grounds, and being told by one of his servants, when upon the road from Saltcoats to Southennan, within the parish of Ardrossan, and said county of Air, that he observed two persons, one of them with a gun, at a small distance, upon his lordship's ground of Ardrossan, the said deceased earl, who, by an advertisement in the news papers, had forbid all unqualified persons to kill game within his estate, came out of his coach unarmed, and mounted a horse, which was led by his servant, and leaving in his coach an unloaded gun, he rode towards the two persons, who in the mean time went off the earl's grounds of Ardrossan into the adjacent sands; and he having come near to the two persons on the said sands, and discovering the one with the gun to be the said Mungo Campbell, he accosted him, by saying, *Mr. Campbell, I did not expect to have found you so soon upon my grounds, after the promise you made me, when I last catched you, when you had shot a hare.* And the earl having thereupon desired him to deliver his gun to him, he refused so to do; and, upon the earl's approaching towards him, he cocked his gun, and presented, or pointed it at him; and upon the earl's then saying, *Sir, will you shoot me?* he answered, That he would, if his lordship did not keep off. To which the earl replied, That if he had his gun, he could shoot pretty well too, or used words to that import, and desired a servant to bring his gun from his coach, which was then at

ſome diſtance; and the earl having diſmounted, and walked towards him, leading his horſe in his hand, without arms or offenſive weapons of any kind, the pannel retired, or ſtept backwards, as the earl approached, and continued to point his gun at him, deſiring his lordſhip again to keep off, or by God he would ſhoot him; and a ſervant near to the earl, having begged of the pannel for God's ſake to deliver his gun, he again refuſed, ſaying he had a right to carry a gun; to which lord Eglintoun anſwered, that he might have a right to carry a gun, but not upon his eſtate without his liberty. But the pannel ſtill perſiſted in refuſing to deliver his gun, and by ſtriking his foot againſt a ſmall ſtone, having fallen upon his back, when retiring, and keeping his gun pointed at lord Eglintoun, as above deſcribed, the muzzle of the gun came thereby to be altered in the direction from lord Eglintoun, and to be pointed near ſtraight upwards; and lord Eglintoun, who was only diſtant from the pannel two or three yards, having ſtopped or ſtood ſtill upon his falling, the pannel, as ſoon as he could recover himſelf, and reſting upon his arm or elbow, aimed or pointed his gun to the ſaid Alexander earl of Eglintoun, and wickedly and felonioufly fired at him, then ſtanding unarmed, ſmiling at his accidental fall; and by the ſhot he was wounded in the belly, in a dreadful manner, the whole lead ſhot in the gun having been thrown into his bowels; of which wound the ſaid Alexander earl of Eglintoun died that night about twelve o'clock."

The libel further ſets forth, "That the pannel, after perpetrating ſo cruel, wicked, and barbarous a crime, did immediately run to one of lord Eglintoun's ſervants, who had brought his gun from his coach, and who was ſtanding at ſome diſtance, and endeavoured to wreſt the gun from him, but was prevented by the aſſiſtance of another ſervant; and when the two ſervants were engaged with the pannel, defending the gun, and endeavouring to ſecure him, the earl, who was then ſitting on the ground, called to the ſervants to ſecure the man, for he had ſhot him; but not to uſe him ill, or uſed words to that purpoſe and effect; and, upon the pannel's being brought near to lord Eglintoun, he ſaid to him, Campbell, I would not have ſhot you.

"That the pannel, when carrying from the place, where he committed the foreſaid crime, in Saltcoats and Irvine, did acknowledge to ſundry perſons, that he had wilfully and intentionally ſhot the ſaid earl; and that the earl, when within two or three hours of his death, in giving an account to John Muir, ſurgeon in Glaſgow, of what had paſſed betwixt the pannel and him, did, in ſubſtance, ſay, that the pannel did take an aim at him, and ſhot him wilfully. "At

"At leaſt, at the time and place above deſcribed, the ſaid Alexander earl of Eglintoun was felonioufly murdered, or bereaved of his life, by a wound he received from the ſhot of a gun, and of which wound he died in about twelve hours, or ſome ſhort ſpace thereafter; and the pannel was actor, art and part of the ſaid murder." And the libel concludes, "That all this, or part thereof, being proved by the verdict of an aſſize, the pannel ought to be puniſhed with the pains of law."

The pannel having been brought to the bar of the court of juſticiary, and having heard the foreſaid indictment read, he denied the libel, as laid; and, at the ſame time, his counſel ſtated the facts on which they founded his defence to the following purport:

"That the pannel, who is an exciſe-officer, was in uſe to carry a gun along with him, when he went out in queſt of ſmugglers, and that he ſometimes took a ſhot when he met with any *game* upon the lands of certain gentlemen in the neighbourhood, from whom he had that liberty; that about a year ago, he went to the Horſe-Iſland (a noted place for ſmuggling-veſſels) ſituated upon the coaſt, about two miles from Saltcoats; that, in returning from this iſland, he took a road for foot-paſſengers, running through one of lord Eglintoun's parks, and having ſtarted a hare, and having his gun along with him, he killed the hare; that he having been quarrelled by the earl for ſo doing, he promiſed never to offend again; and as he knew that the earl was ſtrict in preſerving the game, and that he frequently held courts for the purpoſe of proſecuting poachers, he was careful not to tranſgreſs; and, accordingly, he even gave away his fiſhing-rod, when he heard that his lordſhip had prohibited fiſhing upon the water of Garnock.

"That the pannel, having a licence to ſhoot on the lands of Montfodd, the property of Dr. Hunter, lying to the north of the lands of Ardroſſan, the property of the earl; and having met with John Brown on the day libelled, they propoſed to take their courſe that way, and went by the common church-road, through the grounds of one Miller, towards Montfodd.

"That, having met with no game, they reſolved to croſs over to ſome riſing grounds, from whence they could have a view of the Horſe-Iſland; from whence they went through the lands of Montfodd, paſſed over a ſandy plain; and, when they came towards the property of lord Eglintoun, in place of turning down by the ſea-ſide, they kept a little higher, through the lands of Ardroſſan, the property of the earl, that they might ſee the iſland; after which they came down, and proceeded towards the ſhore.

" That in their way thither, they perceived a coach at a little diſtance; and a perſon having come up to them on horſeback, whom they diſcovered to be lord Eglintoun.—His lordſhip accoſted the pannel with great paſſion, calling him *Scoundrel* and *Raſcal*; aſked him how he preſumed to ſhoot on his ground, and demanded of him to deliver up his gun. The pannel was amazed; told him, he had not fired a ſhot that day, and had not been on his ground with the intention of killing game. The earl, however, perſiſted; and the pannel proteſted, and ſaid, 'Purſue me at law, but I will not give up my property,' or words to that import. The pannel at the ſame time held forward the gun, *as the firm indication of his purpoſe* not to part with it, and warned his lordſhip not to perſiſt in the demand. The earl, however, puſhed forward, with an intention to ſeize the gun by force. The pannel retired, and the earl diſpatched his ſervant for a gun, ſaying he could ſhoot as well as the pannel. Brown thereupon took fright, and retired towards Saltcoats.

" That the earl's ſervant returned with a gun, and was within two or three yards of his lordſhip, when the pannel having fallen, his gun unfortunately went off, and ſhot the earl, who was very near him.

" That the ſervants did thereupon immediately attack the pannel, beat, and uſed him cruelly: that the pannel, in his own defence, endeavoured to ſeize the earl's gun, but was prevented by ſuperior force."

The above is the ſubſtance of the facts which were ſtated on behalf of the pannel; and from thence it was argued, 1*mo*, That the pannel had no intention to kill the earl: that his death was occaſioned by the gun's having *accidentally* gone off, when the pannel fell; and that, this being the caſe, there was no juſt ground for charging the pannel with the crime of murder: that what happened was no other than homicide, purely caſual, which meriteth no puniſhment.

2*do*. It was pleaded that, ſuppoſing the pannel had ſhot the earl intentionally, yet the ſame was *juſtifiable*; 1ſt, In reſpect it was done upon juſt provocation, which he undeſervedly received from the earl. 2dly, In reſpect that it was neceſſary, in defence of his property. And, 3dly, in defence of his life.

3*tio*, It was pleaded, that, ſuppoſing the pannel to have exceeded the *moderamen inculpatæ tutelæ*, in defending either his property or his life, he ought not to be puniſhed capitally, as for the crime of murder. And,

4*to*, It was maintained, that, as the act did not proceed from premeditated malice and forethought, but was committed on a *ſuddenty*, *ex calore iracundiæ*, an arbitrary puniſhment could only be inflicted.

The court having ordained both parties to give in informations, in obedience thereto, this is offered on behalf of the profecutors.

And as to the firſt defence, viz. that the homicide in this caſe was merely *caſual*, the gun having accidentally gone off, upon the pannel's falling to the ground, the purſuers ſhall not diſpute, that the ſame, if proved, will be ſufficient to elide the libel, in ſo far as it concludes for a capital puniſhment, or the pains of law; but as an *intention* to kill muſt be *preſumed*, where one perſon kills another with a lethal weapon, eſpecially in the preſent caſe, where it appears from the facts as ſtated for the pannel, that he declared a fixed and determined reſolution to kill, if the earl did not keep off, it will require a very ſtrong and pointed proof to gain belief, that the ſhot immediately following theſe threats was merely accidental; and however this defence, if proved, might be ſufficient to exempt the pannel from the pains of death, yet, as he was at any rate groſly culpable in having a loaded gun confeſſedly placed in ſuch a poſition, that if it ſhould accidentally go off, it could not fail to kill, the pannel would unqueſtionably be liable to a very high arbitrary puniſhment.

The ſecond defence inſiſted upon for the pannel was, that, ſuppoſing him to have intentionally killed the earl, yet, as he had received high provocation, the ſame was *juſtifiable*, at leaſt, that it ought to be available to free him, *a pœna ordinaria*; and this provocation he was pleaſed to qualify in the following manner, viz. that the earl accoſted him with great paſſion, calling him ſcoundrel and raſcal, and accuſing him of a breach of promiſe; whereas, from the time he had made that promiſe, he had never been upon the earl's ground with an intention of killing game.

This averment of the earl's having accoſted the pannel with inſulting language and opprobrious names, is what the purſuers do poſitively deny; the indictment ſets forth very particularly the whole converſation which paſſed between the earl and the pannel on that occaſion, and the purſuers are confident no more will come out on proof; but allowing, for argument's ſake, that the earl had expreſſed himſelf in the words that are here alledged, there is no relevancy in the defence, and it is founded neither in law nor in ſound reaſon; and indeed, if ſuch a defence was to be admitted, it would deſtroy the chief purpoſe and intendment of the law, in inflicting the pains of death upon this cruel and unnatural crime.

Murder is a crime of ſo horrid an aſpect, and ſo ſhocking to human nature, that even the moſt depraved part of mankind, when in cool blood, will ſtartle at the thoughts of

committing it. It very rarely happens, that a man goes coolly and deliberately to work in murdering one of his fellow-creatures. Solon, a great and wise legislator, thought the crime of parricide so unnatural, that he considered it as an affront to human nature to suppose that mankind could be guilty of it, and therefore made no positive law against the commission of it; and, for the same reason, if the punishment of murder was only to be confined to cases where it is coolly and deliberately perpetrated, the safety of society would scarce require a positive law against the commission of it; so that the great object of the law was truly to curb the passions of mankind, and to prevent them from destroying one another, when roused and heated, whether by provocation, real or imaginary. It is the duty of mankind, who are endowed with rational faculties, to curb and subdue their passions, and to keep them within proper bounds; and as laws were made and became necessary, chiefly on account of the depravity of mankind, these passions cannot afford a sufficient excuse against the ordinary punishment of an atrocious crime. The safety and good of society require, that the ordinary punishment should be inflicted, that mankind may be cautious, and even when provoked, may keep a strict guard over their actions, and curb and confine their passions within proper bounds.

It would therefore be highly inexpedient for the peace and safety of mankind, to hold it as any excuse for the commission of an atrocious crime, that the same was done when in the heat of passion or anger, upon provocation received; for, besides, that there is no proportion betwixt the life of a man, and any verbal injury that possibly can be given, it is a rule founded in the very being and existence of society, that no man is at liberty to avenge his own wrongs; and, as a verbal injury already received, cannot be recalled, by killing the person who gave the injury; so the making it lawful, either to kill, or otherwise to punish the person who gave the injury, would be truly allowing mankind to resent and avenge their own wrongs, which the laws of no civilized state will ever permit, as it must necessarily tend to the dissolution of society, and of all good order and government.

Accordingly, it is an opinion, universally received among lawyers, that no verbal injury, which is all that is alledged in this particular defence, is sufficient to excuse *a pœna ordinaria*, in the punishment of the crime of murder.

This very question is stated by Voet, (lib. 48. tit. 8. § 9.) and resolved in the following words: "Proinde, si quis injuria quadam verbali provocatus, usque adeo iræ indulgendum censuerit, ut stricto cultro, gladiove injuriantem occidat, vix est,

eſt, ut ab ordinaria pœna abſolvendus ſit, eum multum interſit inter verbales injurias et atrociores reales, quarum hæ, ſi præceſſerint, mitigationem pœnæ ſuadere poſſunt; illæ non item, quippe tam leves habitæ, ut recantatione, deprecatione, ſimilibuſque modis ſecundum tradita, in *tit. de injuriis*, evaneſcant."

Sir George Mackenzie (tit. Murder, § 3.) is alſo clearly of this opinion, which he delivers in the following paſſage: "It is alſo controverted amongſt lawyers, if, ſeeing honour is as dear as life, it be lawful to kill him who aſperſes our honour, as it is lawful to kill him who aſſaults our life; and, albeit Farinacius be of the judgment, that he who is thus provoked, being a perſon of far more eminent condition than the injurer, killing him is not to be puniſhed as a murderer, *ſed pœna extraordinaria, licet injuria ſit verbalis*: yet, in my judgment, he errs in that poſition; for, in effect, that is not ſelf-defence, (becauſe the verbal injury cannot be retreated nor retained) but it is *revenge*: yet *dolor juſtus aliquando operatur, ut pœna ordinaria temperetur.* But yet that is not allowed in killing, and ſuch other injuries, which *non poſſunt revocari.*"

Matthæus in mentioning the caſes where the ordinary puniſhment ought not to be inflicted, makes no mention of verbal injuries, but confines it to thoſe real injuries in which human nature cannot be ſuppoſed to overcome the juſt reſentment naturally ariſing againſt the committers of them; "Eo amplius, et ſi dolo malo homo cæſus ſit, tamen interdum pœna gladii remittitur; nam qui impetu occidunt, et ſi dolo non carent, tamen ſi juſtus dolor impetum concitaverat mitius puniuntur. Ita reſponſum de marito qui occidit uxorem adulteram, &c." Tit. de Sicariis, cap. 3. ſect. 4.

And although the law of England has, in certain caſes, been leſs ſevere in the puniſhment of homicide, than the law of Scotland, and has accordingly eſtabliſhed a diſtinction betwixt murder and manſlaughter, yet it is there laid down as a general rule, that a verbal injury is in no caſe ſufficient to acquit from the ordinary puniſhment of murder; eſpecially if the ſame was committed by a lethal weapon.

This doctrine is clearly laid down in a book of great authority in the law of England, viz. a Treatiſe upon certain Branches of the Crown Law, by Mr. Juſtice Foſter. In treating of *homicide*, cap. 5. ſect. 1. he ſays, "That words of reproach, how grievous ſoever, are not a provocation ſufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or geſtures, expreſſive of contempt or reproach, without an aſſault upon the perſon.

This

" This rule will, I conceive, govern every caſe where the party killing upon ſuch provocation, maketh uſe of a deadly weapon, or otherwiſe manifeſteth an intention to kill, or to do ſome great bodily harm; but if he had given the other a box on the ear, or had ſtruck him with a ſtick or other weapon, not likely to kill, and had unluckily, and againſt his intention, killed, it had been but manſlaughter."

" The difference between the caſes is plainly this: in the former the *malitia*, the wicked, vindictive diſpoſition already mentioned, evidently appeareth; in the latter, it is as evidently wanting. The party, in the firſt tranſport of his paſſion, intended to chaſtiſe for a piece of inſolence, which few ſpirits can bear; in this caſe, the benignity of the law interpoſeth in favour of human frailty; in the other, its juſtice regardeth and puniſheth the apparent malignity of the heart.

" And it ought to be remembered, that in all other caſes of homicide, upon ſlight provocation, if it may be reaſonably collected from the weapon made uſe of, or from any other circumſtance, that the party intended to kill, or to do ſome great bodily harm, ſuch homicide will be *murder*. The miſchief done is irreparable, and the outrage is conſidered as flowing rather from brutal rage, or diabolical malignity, than from human frailty; and it is to human frailty, and to that alone, the law indulgeth in every caſe of felonious homicide."

The very ſame doctrine is laid down by Mr. Blackſtone, in his Commentary upon the Law of England, vol. IV. fol. 200. " If a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight, or no apparent cauſe. *No affront, by words or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence, as manifeſtly endanger the life of another.* But if the perſon ſo provoked, had unfortunately killed the other, by beating him in ſuch a manner, as ſhewed only an intent to chaſtiſe, and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder."

The ſame doctrine is laid down by Hawkins, tit. Murder, § 33.

Both the law and the reaſon of it, are elegantly and diſtinctly pointed out by theſe authors. The law hath ſo far made an allowance for the frailty of human nature, that where a perſon has received a verbal injury, he may retort it; and it will even afford an alleviation of the offence, ſuppoſing he ſhould proceed to a moderate chaſtiſement; but as there

there is no ſort of proportion betwixt a verbal injury and the life of a man, which, when taken away, can never be reſtored, ſo, where a perſon proceeds in reſentment of ſuch injury, to imbrue his hands in the blood of any of his fellow-creatures, the law has moſt juſtly conſidered, that an action ſo wicked and barbarous can only proceed from ſuch a malignity of heart and depravity of diſpoſition, as muſt render him a very unfit member of ſociety, and a proper object of that vengeance which the law has moſt juſtly inflicted upon the ſhedding of innocent blood.

But it will be neceſſary to inſiſt farther upon this point, as it appears from the facts, as ſtated by the pannel himſelf, that it was not in a heat of paſſion, and in reſentment of any provocation the pannel is ſuppoſed to have received, that the earl was killed. The abuſive language which the earl is ſuppoſed to have given on the occaſion, is ſaid to have happened upon the earl's firſt accoſting the pannel; ſo that, if it had been done in the heat of paſſion, on account of the provocation received, it muſt naturally have happened when the abuſe was given; whereas it appears, from the pannel's own ſhowing, that he was not overcome with paſſion upon the occaſion; that he continued perfectly maſter of himſelf; that he accordingly retired for ſome time, and that upon the earl's approaching near to him, the pannel killed him, in proſecution of a fixed and determined purpoſe and reſolution.

And this leads the purſuers to conſider what was in the next place offered on behalf of the pannel, viz. that it was lawful for him to kill the earl in defence of his property.

Upon this point, it was ſaid for the pannel, that he had not been trepaſſing upon the earl's property; that he was not upon his grounds when the earl attempted to ſeize his gun; that he had not been upon them that day with an intention to kill game; and that, although he had, yet the law gave the earl no power to ſeize his gun *brevi manu*, or to inflict any other puniſhment upon him for the ſuppoſed treſpaſs; that the earl ought to have had recourſe to a court of juſtice for inflicting the penalties of the law for the ſuppoſed offence; and that this point had been ſo determined by the court of ſeſſion, upon the 23d of January, 1753, in the caſe of Mr. David Gregory, profeſſor of mathematicks in the univerſity of St. Andrew's, againſt Walter Wemyſs of Lawthocker; and from the premiſes the following concluſion was drawn, that as it was unlawful for the earl to ſeize the pannel's gun, the pannel was intitled to defend his property againſt ſuch unlawful attack, even at the expence of the life of the invader; and this ought the more eſpecially to afford the pannel a good defence in the preſent caſe, that he having been a ſoldier, he could

could not, conſiſtently with his *honour*, ſurrender his gun to any perſon whatever.

Whether the pannel's conduct, on this occaſion, was conſiſtent with the laws of honour, ſhall be afterwards conſidered; that it was highly inconſiſtent with the doctrines and precepts of Chriſtianity, cannot be diſputed. It is therein laid down, that "if any man will ſue thee at the law, and take away thy coat, let him have thy cloak alſo; and whoſoever ſhall compel thee to go a mile, go with him twain." Matth. v. 40, 41. The great Author of our religion did thereby mean to teach mankind, that it was more becoming the dignity of human nature to forgive injuries than to reſent them, and to inculcate upon them the ſuitableneſs of a ſpirit of meekneſs and moderation, as moſt conducive not only to the private happineſs of individuals, but to the peace, quiet, and good of ſociety; and that injuries, which in their nature are trifling and inconſiderable, ought much rather to be ſubmitted to, than to be made the ground of quarrel and diſpute; and it muſt ſurely, at firſt ſight, appear very inconſiſtent with the aforeſaid doctrine, for any man to maintain, that rather than part with the poſſeſſion of a trifling property (which, if unjuſtly taken from him, could eaſily be recovered) he ſhould think himſelf at liberty to take away the life of one of his fellow-ſubjects.

Indeed, without having recourſe to any poſitive law, either divine or human, the purſuers may appeal to the common feelings of mankind, for a determination of the preſent queſtion. There is no man who is poſſeſſed of any ſpark of humanity, or of any notions of right or wrong, who muſt not at once declare that he would much rather ſurrender a property, ten times the value of that which was the ſubject of conteſt in this caſe, than ſhed the blood of the meaneſt, or of the moſt abject of the human ſpecies.

As to the pannel's honour, which was much inſiſted upon in this caſe, it is, with ſubmiſſion, rather too ludicrous to ſay, that a man whoſe former rank in life was none other than that of a common ſoldier, and who at preſent is an inferior officer of exciſe, was in honour called upon rather to take away the life of one of his fellow-creatures, than to yield the poſſeſſion of his gun, which he could eaſily again have recovered, if it was unjuſtly taken from him. Indeed this plea of honour, which is not a *nomen juris*, is a very improper topick to be urged before your lordſhips as a court of law and of juſtice. Your lordſhips are not here to judge according to the falſe notions and punctilios of honour that are commonly entertained amongſt a certain ſet of men; but whether in law and in juſtice, the pannel was intitled to maintain

tain the poſſeſſion of his gun at the expence of the life of one of his majeſty's ſubjects.

At the ſame time, the purſuers will be pardoned to think, that if the pannel was to be tried by a court of honour, properly ſo called, he would likeways be condemned, and that it would be found, that he had not only acted a moſt illegal, barbarous, and inhuman part, but had behaved moſt *diſhonourably*. The earl accoſted him defenceleſs and unarmed. If the pannel had conſidered his honour as injuriouſly attacked by the demand which the earl made to deliver up his gun, he ought either to have laid aſide his gun, and to have engaged with the earl upon equal terms, or he ought to have challenged him to ſingle combat, and have waited till the earl was properly armed for that purpoſe. But when, in place of following that courſe, (which might have been expected from one who pleads the point of honour) he pours a loaded muſquet into the bowels of a man unarmed and totally defenceleſs; the action muſt be condemned, not only as barbarous and cruel, but as moſt diſhonourable, by every man who poſſeſſes the ſmalleſt ſpark of honour in his breaſt. Honour, therefore, cannot avail the pannel in this caſe. The point of honour is much againſt him. And therefore the purſuers ſhall leave that topick, and conſider the queſtion in this ſimple view, Whether the pannel was intitled to maintain the poſſeſſion of his gun at the expence of the earl's life, ſuppoſing it to be true, but which was by no means the caſe, that the earl had either aſſaulted the pannel, with an intention to bereave him of his gun, or had uſed any threatening expreſſions, ſignifying his determined reſolution ſo to do.

And, in the *firſt place*, the purſuers beg leave to diſpute the point of law that was maintained upon the other ſide, *viz.* That the earl had not a right to ſeize the pannel's gun. By act 13 parl. 1707, it is expreſly enacted, "That no common fowler ſhall preſume to hunt on any grounds, without a ſubſcribed warrant from the proprietors of the ſaid grounds, under the penalty foreſaid, beſides forfeiting their dogs, guns, and nets, to the *apprehenders* or diſcoverers."

It is humbly ſubmitted to your lordſhips, if it is not implied in the very words of this ſtatute, which forfeits the dogs, guns, and nets to the *apprehenders*, that it is lawful to ſeize the dogs, guns, and nets, *brevi manu*, from the perſon found in the tranſgreſſion. This, with ſubmiſſion, is the only ſenſe and conſtruction which can be put upon the word *apprehenders* in the foreſaid ſtatute; and as this is the natural conſtruction of the words, ſo it ſeems to be agreeable to the true ſpirit and intendment of the ſtatute, *viz.* by the immediate ſeizure of theſe inſtruments of deſtruction in the poſſeſ-

ſion of ſuch unqualified perſons found *in reatu*, to prevent their being again uſed to the ſame unlawful purpoſes, or their being ſecreted and otherways diſpoſed of, if allowed to remain in their poſſeſſion, whereby the after-diſcovery of them might be attended with difficulty: and therefore it would appear that the legiſlature, from a ſenſe of theſe inconveniencies, had, by the foreſaid ſtatute, introduced this more ſummary and effectual remedy, in permitting the dogs, guns, and nets to be *brevi manu* apprehended, in order to lay the foundation for an after-conviction in a court of juſtice.

Neither is this any thing new in the law; all the ſtatutes made againſt ſmuggling, authoriſe the officers of the revenue to begin with ſeizing the goods, leaving it to be afterwards tried by the proper court, whether they have been juſtly ſeized or not, and whether they ſhould be carried into condemnation, or reſtored to the proper owner.

And as to the deciſion, Gregory contra Wemyſs, it is, in the firſt place, a ſingle deciſion; and when the queſtion does again occur, it would well merit to be reconſidered, eſpecially as the ſtatute has been univerſally underſtood in the ſenſe now contended for by the purſuers. It has from time immemorial been a general practice over the whole kingdom, to ſeize dogs, guns, and nets, without any previous conviction; and until the foreſaid caſe in the year 1753, no action of damages or reſtitution had ever been brought, on account of ſuch ſeizures.

But, *2dly*, The deciſion, in the caſe of Gregory, as it ſtands reported, does not appear to eſtabliſh the general point. Baird, from whom the gun was ſeized, was not proprietor of the gun: it belonged to Mr. Gregory, who was accompanied by Baird; and it does not appear from the deciſion, that Mr. Gregory was not intitled to kill game.

It is of no moment, that the pannel was not upon the earl's ground, but upon the ſea-ſhore, when his gun was demanded; he had been upon the earl's property immediately before, under the earl's own obſervation; and as it muſt be preſumed, that he was there with an intention of killing game, if he had found any, the earl had the ſame right to ſeize his gun, as if he had got up with him before he left the earl's grounds, by ſtepping in upon the adjacent ſands.

The purſuers, at the ſame time, apprehend, that it is very immaterial in the preſent queſtion, whether the earl, in ſtrict law, had a title, *brevi manu*, to ſeize his gun or not. Was the queſtion here ſimilar to that in Mr. Gregory's caſe, about reſtitution of the gun, as unlawfully ſeized, the queſtion in law, How far the ſeizure was legal or not, would fall properly to be conſidered and determined; but, for the preſent pur-

purpose, it is sufficient to say, that it was universally understood, that the guns of persons, who have neither title nor licence to hunt upon the grounds of another, might be seized, *brevi manu*, and that, in fact, such seizures were generally made without any complaint.

This is sufficient to shew, *quo animo*, the earl required of the pannel to deliver his gun. The pannel could not but know, that the earl did not intend to commit a robbery, by violently and *feloniously* carrying off the property of another, to which he had no manner of right, but that he acted only under the common apprehension, that every heritor had a right to seize dogs, guns, and nets, from unqualified persons hunting upon their property, without any licence. It is plain, that the earl, if he had, *de facto*, seized and carried off the gun, could not have been tried as guilty of felony, even upon the supposition, that, in strict law, he was not authorised to make the seizure; the fattest it could have gone, would be only to found the pannel in a civil action for restitution, or perhaps for damages; and, when that is the case, it is, with submission, clear, that the pannel, in defending his property against that trespass, was not intitled to take away the life of the supposed trespasser.

It was indeed maintained on behalf of the pannel, that a man was intitled to defend his property to the last, even at the expence of the life of the invader; and sundry authorities were appealed to, in support of this general proposition, particularly, Grotius *De jure belli et pacis*, lib. 2. cap. 1. § 11, Puffendorf *De jure naturæ et gentium*, Carpzovius, and others; but when these authorities are attended to, none of them can avail the pannel. These authorities do only apply to the case where one's property is *feloniously* invaded; and when it cannot be otherwise secured than by taking away the life of the invader; which will never apply to the present case, where the attack made upon the pannel was not with a felonious intention, but where his property was absolutely secure, and could easily have been recovered, if the earl had not a just title both to seize and to hold it.

And it was a poor reply that was made on the other side, *viz.* that the pannel was not obliged to submit to the expence of a law-suit, in order to recover his property; because, if it should be found that the earl was in the wrong, his gun not only would have been restored to him, but the court would have fully indemnified him of the whole damages and expences he could qualify he had sustained, by the illegal seizure and detention of his gun.

The pannel's counsel did likewise appeal to *l.* 3. § 9. *ff. De vi et vi armata*; and also to *l.* 1. *Cod. unde vi*; but with

what propriety, the purſuers are at a loſs to diſcover. The firſt of theſe proves no more than this, That, where one is invaded with arms, it is lawful for him to defend himſelf by arms: and, as to the other text, it proves no more than this, That a man is entitled to defend his poſſeſſion *moderamine inculpatæ tutelæ*, without defining the bounds or limits thereof; and the ſame anſwer does occur to the paſſage from lord Stair, fol. 174, and from the late Inſtitute, vol. i. fol. 512, § 31. No more is there ſaid, than that one may continue or recover his poſſeſſion by force *ex incontinenti*; but theſe learned authors have no where ſaid, that it is lawful for the perſon in poſſeſſion to kill the perſon who endeavours to eject him; far leſs could it be maintained, that a perſon was juſtifiable for killing, under the circumſtances of the preſent caſe, where the perſon in poſſeſſion did not run the ſmalleſt riſk of loſing his property, if he was entitled to hold it; and where the perſon who is ſuppoſed to have attempted the ſeizure, was totally defenceleſs and unarmed, and ſo could not be ſuppoſed to intend violence of any kind.

If the earl had no title to demand the pannel's gun, he might, no doubt, refuſe to deliver it up; and if the earl had thereupon attempted to take it from him by force, he might, perhaps, have been juſtifiable in ſtruggling to maintain his poſſeſſion. But it is repugnant to reaſon, and the common feelings of mankind, to ſay, that, under the circumſtances of the caſe, the pannel was at liberty to bereave the earl of his life, rather than part with his gun.

The purſuers humbly apprehend, that, in ſound law, and in reaſon, no man is intitled to kill, in defence of his property, unleſs where he is attacked with a felonious intention to rob and bereave him of his property; but where the perſon who makes the attack has clearly no felonious intention, but only, under an erroneous apprehenſion of his own right, commits a treſpaſs upon the property of his neighbour, and for which redreſs can eaſily be had in a court of law, in ſo far as the party has been injured; the law of no civilized country will, in theſe circumſtances, allow a perſon to kill another, under the pretence of defending his property.

The contrary doctrine would lead to ſtrange and abſurd conſequences. If killing was juſtifiable in ſuch a caſe as the preſent, a perſon might be equally juſtified for killing for every treſpaſs that was made upon his property. If it was lawful for the pannel to kill the earl, in order to prevent him from ſeizing his gun, notwithſtanding he believed he had a right to ſeize it, by the ſame rule the earl might have been juſtified for killing the pannel, in attempting to come upon the earl's lands againſt his will.

Your

Your lordſhips know that, by the ſtatute 1686, it is lawful for every proprietor or poſſeſſor of lands, *brevi manu*, to poind the cattle found upon his grounds, and detain them, until he be paid half a merk for each beaſt found in the ſkaith. Now, let it be ſuppoſed, that the heritor, in attempting to ſeize and poind, ſhould be reſiſted by the proprietor of the cattle; and that the proprietor of the grounds, from his not being preciſely acquainted with the marches, ſhould attempt to poind ſome of theſe cattle which were, *de facto*, not upon his property, but upon the other ſide of the march; is it poſſible to maintain, that the proprietor of the cattle, in order to prevent his property from being unjuſtly carried off from him, would be juſtified in killing the perſon making the ſeizure? It is believed, that no man would heſitate a moment in declaring the proprietor of the cattle guilty of murder, when it was plain, that the proprietor of the lands had no felonious intention to bereave him of his property; but had only been led to commit the treſpaſs, upon an erroneous apprehenſion of his own right; and when, at the ſame time, the cattle could be recovered by an action at law, with full damage and expences of proceſs.

It is founded in the very nature of ſociety and government, that no man is intitled to avenge his own wrongs, or take juſtice at his own hand, unleſs where the laws of the ſociety cannot give him relief. In this view, it may be lawful to defend himſelf againſt an irreparable loſs, even at the expence of the life of the aggreſſor. A woman, for example, may be juſtified for killing the perſon who makes an attack upon her chaſtity, when ſhe cannot otherwiſe prevent the violation of it; and, in like manner, it may be lawful, in defence of one's property, to kill a robber who felonioſly endeavours to bereave him of it; becauſe, without ſo doing, his property may be loſt. When the robber has once carried off the goods, it may not be in the power of the law to give the perſon injured any relief; but that will never apply to the caſe in hand, and the other caſes above-mentioned, where there was clearly no felonious intention, and where the party ſuppoſed to be injured ran no riſk of loſing his property, which remained perfectly ſecure; and where, if he was in the right, the public law of the land would give him full indemnification and relief.

The above diſtinction is clearly pointed out by numbers of authorities. Puffendorf, in his treatiſe *De jure naturæ et gentium*, lib. ii. cap. 5. §4. after ſtating the rights competent to mankind in a ſtate of nature, proceeds as follows: "Aſt vero quod licet in naturali libertate viventibus, qui ſuam ſalutem propriis viribus proprioque ex judicio expediunt; id haud quaquam indulgetur illis, qui in civitatibus degunt, et quidem imprimis adverſus ſuos cives. Hi enim violentam ſui

defenſionem

defenſionem adverſus cives perpetuos aut temporarios ita modefati tenentur, ut eam tunc demum adhibeant, quando tempus ac locus non ferunt auxilium magiſtratus ad repellendam eam injuriam implorari; *qua vita vitæque æquipollens, aut irreparabile damnum in præſentaneum periculum conjicitur.* Et quidem, ut periculum tantummodo depellatur; vindicta autem et cautio de non offendendo in poſterum magiſtratus arbitrio relinquatur."

The diſtinction already ſtated, is likewiſe pointed out by Mr. Juſtice Foſter, who, in the treatiſe already mentioned, *on homicide*, cap. iii. lays it down, that "in the caſe of juſtifiable ſelf-defence, the injured party may repel force with force, in defence of his perſon, habitation, or property, againſt one who manifeſtly intendeth and endeavoureth, with violence or ſurprize, *to commit a known felony upon either.*" In theſe caſes he is not obliged to retreat, but may purſue his adverſary, till he findeth himſelf out of danger; and if in a conflict between them he happeneth to kill, ſuch killing is juſtifiable."

And in the ſame chapter, he ſays, "Where a *known felony* is attempted upon the perſon, be it to rob or murder, here the party aſſaulted may repel force with force, and even his ſervant then attendant on him, or any other perſon preſent, may interpoſe for preventing miſchief; and if death enſueth, the party ſo interpoſing will be juſtified. In this caſe, nature and ſocial duty co-operate."

And in cap. v. § 4. he ſays, that, "no man under the protection of the law is to be the avenger of his own wrongs. If they are of ſuch a nature for which the laws of ſociety will give him an adequate remedy, thither he ought to reſort."

The diſtinction which the purſuers have endeavoured to eſtabliſh, is clearly pointed out by this learned judge. He, in ſtating, in what caſes it is juſtifiable to kill in defence of life and property, confines it to the caſe where a *known felony* is attempted upon either, by robbery or murder; but where the attack made upon property is of ſuch a nature that the law can give an adequate remedy, the perſon attacked is not entitled to avenge his own wrongs, but he muſt reſort to the courts of law for redreſs.

The very ſame doctrine is laid down by Blackſtone, *lib.* iv. *cap.* 14. § 3. "If any perſon attempts a robbery or murder of another, or attempts to break open a houſe in the night-time, which extends alſo to an attempt to burn, and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking of any houſe in the day-time, unleſs it carries with it an attempt of robbery alſo."

And

And Hawkins in his Treat. of the Pleas of the Crown, (lib. i. cap. 31. § 33.) has the following paſſage: "Alſo it ſeems to be agreed, that no breach of a man's word on promiſe, *no treſpaſs either to lands or goods*, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe him being guilty of murder—who *is* ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard; if he kills in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his defence or not; for *ſo baſe and cruel a revenge*, cannot have too ſevere a conſtruction."

From the above authorities, it is extremely plain (what indeed is ſtrongly founded in the principles of right reaſon) that no man is at liberty to take away the life of any of his fellow-creatures, in the defence of his goods and property, except where the attack is made upon them with a felonious intention; or, in other words, where the invader, by carrying off the goods, would himſelf have been guilty of felony; but that, where no more than a treſpaſs is committed, and where the party injured can have full and ample reparation by having recourſe to the courts of juſtice, the perſon killing the invader in ſuch circumſtances, is guilty of the crime of murder, and will be juſtly ſubjected to a capital puniſhment.

And indeed ſo anxious have the laws of every well-governed ſtate been to prevent mankind, in a ſtate of ſociety, from conſtituting themſelves the judges and avengers of their own wrongs, that they are not permitted to kill any of their fellow-creatures in defence of their property, even where the ſame is invaded with a felonious intention, except where the ſame becomes abſolutely neceſſary, and the laws of the ſociety unavailable to give them proper reparation and redreſs.

This diſtinction is very clearly laid down in the divine law, which was delivered by Moſes to the Iſraelites, Exod. chap. 22. v. 2 and 3. "If a thief be found breaking up, and be ſmitten, that he die, there ſhall no blood be ſhed for him. *If the ſun be riſen upon him*, there ſhall be blood ſhed for him, for he ſhould make full reſtitution; if he have nothing, then he ſhall be ſold for his theft."

The ſame rule is laid down in the civil law, and, particularly in *l.* 9. *ff. ad leg. Cor. de ſicariis*: "Furem *nocturnum* ſi quis occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit." The general rule among the Romans was, that a thief might be ſlain by night with impunity, but that he could only be lawfully killed by day, *ſi ſe*

telo defenderit. And this doctrine is laid down at great length by Julius Clarus, lib. 5. § Homicidium, No. 47; and also by Damhouderius, cap. 78. No. 1, 2, 3, and many others, unneceſſary to mention particularly.

A diſtinction was attempted to be made between avenging a wrong already committed, and preventing the commiſſion of a wrong. The firſt was admitted to be unlawful, but the contrary was maintained as to the other.—But, with ſubmiſſion, the above authorities ſhow clearly, that there is no foundation for any ſuch diſtinction, in ſo far as applicable to the preſent caſe; for, when a man exceeds the bounds of law and of reaſon, in defending againſt a ſuppoſed injury, he avenges his own wrong, and, conſequently, falls under the rules already laid down; and this muſt the rather obtain, in the preſent caſe, where the ſuppoſed injury had no real exiſtence, but in the pannel's own imagination of what the earl might poſſibly intend upon the pannel's refuſing to deliver his gun.

From what has been ſaid, it may be juſtly concluded, that the pannel cannot juſtify himſelf from the murder, with which he is charged, by alledging, that it was neceſſarily committed in defence of his property. It has been ſhown, from various authorities, and from the reaſon of the thing, that killing in defence of property, cannot be juſtified, unleſs where the ſame was felonioufly invaded, and when, at the ſame time, his property could not be otherwiſe ſecured. Whereas, in the preſent caſe, it is plain, that the deceaſed earl had no ſuch intention. He could not have been charged as being guilty of felony, if, *de facto*, he had ſeized and carried off the pannel's gun. He did not thereby intend felonioufly to rob and bereave the pannel of his property. He was led to make the demand, under the belief and apprehenſion, that the law intitled him to make the ſeizure. Whether he was right or wrong in that apprehenſion, is to the preſent iſſue very immaterial. If he was miſtaken, all that could be charged againſt him, if he had carried off the gun, was a common treſpaſs, upon which he might have been ſubjected in a civil action, to reſtore the gun, and to indemnify the pannel of what expences he ſhould incur in making his claim effectual, and what damages he could qualify he had ſuſtained by the ſeizure or detention. It is plain, that if the gun had been taken from him, he ran no riſk of loſing his property. If he had a juſt title to reclaim it, the law was open, where he would get full redreſs; ſo that it is impoſſible, that, with any ſhow of reaſon or juſtice, it can be maintained, that the putting the earl to death, was neceſſary, in defence of his property.

And,

And, as this part of the pannel's defence muſt unqueſtionably be repelled, as utterly irrelevant, the other part of the defence, viz. that the act was committed in the neceſſary defence of the pannel's life, muſt ſhare the ſame fate. The relevancy of this defence the purſuers do not diſpute, but it is utterly inconſiſtent with the facts, as ſtated for the pannel himſelf. It from thence appears, that no violence or injury of any kind was offered or threatened to the pannel's perſon. On the contrary, although the earl had a gun along with him in the coach, he left it there unloaded, comes out and advances to the pannel, altogether unarmed and defenceleſs, and aſks of him to deliver up his gun.

Nor is it a circumſtance of any moment, that the earl at laſt called for his gun, becauſe it is evident, from the whole circumſtances of the caſe, even as told by the pannel himſelf, that the pannel had no reaſon to apprehend, that the earl thereby meant to commit any act of violence upon the pannel's perſon, whatever intention there may have been to deter and overawe the pannel from putting his threats in execution, it is merely impoſſible, that the pannel could be *conſtitutus in periculo vitæ*, as the earl ſtill continued unarmed and defenceleſs at the time he received the fatal wound; and, at any rate, had the earl been in poſſeſſion of his gun at the time, and that the pannel had ſeriouſly believed, that the earl therewith intended him harm, he knew well that he could at any time have ſaved himſelf, by delivering up his gun, and which has been already ſhown, he was not intitled to withhold, at the expence of the earl's life; his own declaration referred to the indictment, will ſhow, that this is a *mere color quæſitus*; for that the pannel neither was in any danger of his life, nor did apprehend himſelf to be in any ſuch; all that he pretends to have apprehended was, that the earl might intend to take his gun from him.

It was ſaid for the pannel, that he and the earl were upon very unequal terms; for that he had been deſerted by his companion, and left ſingle, whereas the earl was attended with a numerous train of ſervants.

But this circumſtance is, with ſubmiſſion, the worſt apology which the pannel could have offered for his conduct. If he was truly apprehenſive, that bodily harm was intended againſt him, his only ſafety lay in keeping up his fire,—when the gun was diſcharged, he became defenceleſs, and could eaſily be overpowered by ſuch ſuperior numbers; and therefore his unloading his gun in the earl's bowels, affords of itſelf ſufficient proof, that it was not done from any apprehenſion of danger to his own perſon, but that it truly proceeded from the wicked ſcheme, which, from the beginning,

he appears to have deliberately and firmly reſolved upon, viz. rather to bereave the earl of his life, than to part with his gun, upon a falſe and groundleſs apprehenſion, that the earl meant to uſe violence in depriving him of the gun; and therefore, as, from the facts as ſtated by the pannel himſelf, it cannot be qualified, that either at the time he gave the earl the mortal wound, or at any time before, he was *in periculo vitæ conſtitutus*, that part of the pannel's defence, in ſo far as it is founded upon ſelf-defence, will likewiſe fall to be repelled.

It was, in the next place, pleaded for the pannel, that although, in this caſe, he had exceeded the *moderamen inculpatæ tutelæ*, either in defending his life or property, that yet he could not on that account be ſubjected to the *pœna ordinaria*, but that he would only fall to be puniſhed, *quoad exceſſum*, with an arbitrary puniſhment.

But, with all ſubmiſſion, there are not, in the preſent caſe, *termini habiles* for this queſtion. For, in order to intitle any man to plead ſelf-defence to any effect whatever, he muſt be able to qualify, that he was *in periculo vitæ conſtitutus*. If a perſon was truly in imminent hazard of his life, and the queſtion was, whether he could have extricated himſelf out of that danger, without taking away the life of his adverſary, the pannel might, in ſuch caſe, plead with ſome degree of reaſon, that when his life was truly in imminent danger, and when he had killed, in order to relieve himſelf out of that danger, he ought not to be puniſhed with the pains of death, becauſe it was poſſible he might have extricated himſelf, without going to the extremity of killing the perſon who threatened his death; but, as it has been already ſhown, that the pannel was at no time in the ſmalleſt hazard of his life, or had the leaſt reaſon to apprehend, that any degree of violence would be committed againſt his perſon; and as, on the other hand, the perſon whom he killed had threatened him no harm or violence, and was, at the time, unarmed, and totally defenceleſs, it is impoſſible that there can be any room for enquiring whether, or how far, the pannel had exceeded the *moderamen inculpatæ tutelæ*.—Such exceſs does clearly ſuppoſe that he was acting in defence of his life, which has been already ſhown, could not have been the caſe, as his life, at no time, was in the ſmalleſt danger.

Neither is there any room for the queſtion, whether the pannel, in this caſe, exceeded the *moderamen inculpatæ tutelæ*, in defending his property. Such a plea does neceſſarily imply, that it was lawful for him to defend his property, at the expence of the life of the invader. If the earl could have been conſidered as a robber making an attack upon the pannel, with a felonious intention of robbing him of his pro-

property, there might, in that case, have been room for the question, whether the taking away of the earl's life was an act absolutely necessary for the defence of his property, or, if his property could have been saved without going to that extremity; and, under these circumstances, there might have been room for the pannel's maintaining, that he ought not to be punished with the pains of death, because he had gone farther than was strictly necessary for preserving his property. But it has been already shown, that the pannel, in this case, was at no rate intitled to maintain possession of his property at the expence of the earl's life; and, if so, there can be no room for considering whether he has been guilty of an excess or not. It is plain, that he has feloniously shed the blood of an innocent man, without any just cause, and must therefore be subjected to that punishment which the law has inflicted upon the commission of so barbarous and unnatural a crime.

It was pleaded for the panel, in the *last place*, that the law made a distinction betwixt homicide committed upon premeditated malice, and that which was committed upon suddenty or *chaude melle*; that the latter could only be deemed a *homicidium culposum*, and not punishable by death; and that as it could not be said, that there was any premeditated malice in this case, but as the earl was killed upon a sudden quarrel, in consequence of provocation given, that therefore the libel fell to be restricted to an arbitrary punishment; and it was said, that the foresaid distinction took place in the divine law delivered by Moses to the Israelites;—in the civil law;—in the law of England;—and also in the law of Scotland; and was accordingly likewise founded in the practice of this court.

Before considering the particular laws here appealed to, the pursuers must beg leave, in general, to premise, that it will be of no moment to the pannel how this point stands by the laws of other countries, if the distinction does not hold in the law of Scotland. The questions which have hitherto been treated, viz. How far it is lawful to kill in defence of life or goods, depend on principles which are founded in human nature, and which being the same all the world over, the law with regard to them must in a great measure be the same in every civilized state; and therefore, in illustrating the municipal laws of this country in these particulars, the laws of other wise and civilized states may with great propriety be appealed to; but as to the other question, viz. What degree of punishment ought to be inflicted upon the commission of this or the other crime, there is no arguing with the same propriety from the law of one country to

that of another. The intention of punishment is to curb vice, that mankind in society may live in peace and quiet, and be secured both in their lives and properties. Different nations are, some more, and some less, addicted to different vices; and therefore, in enacting punishments, the different tempers and dispositions of the people fall to be considered.

Thus, among the Romans, theft was not punished capitally. It was there thought to be a sufficient check to the commission of that crime to punish the thief with the *restitutio quadrupli, in furto manifesto, et dupli, in furto nec manifesto*; and such was likeways the punishment of theft by the Jewish law: But among modern nations this punishment has been understood as inadequate to the commission of that crime; and so in many cases it is punished capitally. And therefore, although other nations might not find it necessary to punish homicide, without forethought felony, with the pains of death, yet the *præfervidum Scotorum ingenium* might render it very necessary and expedient that homicide, committed on suddenty, and *in rixa*, should be punished capitally with us.

The pursuers at the same time apprehend, that the distinction here attempted to be established for the pannel, did not take place either in the divine law, or in that of the Romans, and does not obtain either in the law of England, or, it is believed, in the law of any well-governed state. It was formerly observed, that the chief intention of punishment is to curb the depraved passions of mankind; and although the person who calmly and deliberately meditates the death of his neighbour, and puts the same in execution, is guilty of a more heinous offence in the sight of God, than he who in the heat of anger kills him suddenly; yet the latter appears to be more dangerous to society than the former. The most wicked man must startle at the thought of a deliberate murder, and therefore it will be but seldom or rarely committed; and as the other happens much more frequently, it becomes necessary and expedient to inflict the highest punishment upon the commission of it, that mankind may thereby be deterred from falling into the crime, and may be led to keep a strict guard over themselves, and curb and confine their passions within proper bounds.

In order to show that the above distinction did obtain in the divine law, the counsel for the pannel did appeal to chap. 21. ver. 13. of Exodus, where it is said, "And if a man lie not in wait, but God deliver him into his hand, then I will appoint thee a place whither he shall flee."—And to chap. 35 of Numbers, ver. 22, 23, and 24, where it is said, "If he thrust him suddenly, without enmity, or have cast upon

him any thing, without laying of wait, or with any ſtone wherewith a man may die, ſeeing him not, and caſt it upon him, that he die, and was not his enemy, neither ſought his harm, then the congregation ſhall judge between the ſlayer and the revenger of blood, according to theſe judgments."

But, with all ſubmiſſion, the texts here appealed to do by no means prove what is intended to be eſtabliſhed by them. It is clear from the texts themſelves, that the manſlayer was only intitled to the benefit of the city of refuge, where the ſlaughter was purely caſual, or by misfortune, without any intention to kill. This is plainly the meaning of the words in *Exodus*, "If a man lie not in wait, but God deliver him into his hands." Theſe words can with no propriety be applied to the caſe of homicide intentionally and wilfully committed, although the intention *non antecedit congreſſum*.

Indeed this matter is clearly explained in the foreſaid 35th chapter of Numbers, ver. 16, 17, and 18, compared with ver. 21. In the three firſt verſes it is ſaid, that he who ſmites with an inſtrument of iron, or who ſmites with throwing a ſtone, or with a hand-weapon of wood, wherewith a perſon may die, and he die, he is a murderer, and the murderer ſhall ſurely be put to death. But in ver. 21, it is ſaid, that "If in emnity he ſmite him with his hand, that he die, he that ſmote him ſhall ſurely be put to death; for he is a murderer."

Your lordſhips will here obſerve, that, where the ſtroke is given with a weapon not deadly, and from which there was no reaſon to apprehend that death would enſue, previous enmity muſt appear, in order to puniſh the killer as a murderer; but where the ſtroke is given with a deadly weapon, and death did enſue, there was no neceſſity to prove any previous enmity. The ſtriking with a lethal weapon did not preſume an intention to kill; and the perſon killing, under theſe circumſtances, was to be held as a murderer; and there was no neceſſity to prove that the ſame proceeded from premeditated malice. An intention to kill is to be preſumed; and it was ſufficient that the intention *antecedit ictum, licet non congreſſum*.

It is from thence plain, that ſlaughter, upon ſuddenty, even without forethought or previous enmity, was capital by the law of Moſes, if the wound was given with a lethal weapon; and that the caſes mentioned in the foreſaid texts do plainly allude to homicide, merely caſual; and which is clearly ſo expreſſed in the foreſaid texts of Exodus, and alſo in the other text in Numbers, where the caſe is ſtated of killing by throwing a ſtone, ſeeing him not; which can never apply to the caſe of intentional homicide.

And that the benefit of thoſe cities of refuge was only given

to those who committed homicide merely casual, or by misfortune, without any intention to kill, is still more clear from Deuteronomy, cap. 19. ver. 4 and 5. "And this is the case of the slayer which shall flee thither, that he may live; whoso killeth his neighbour ignorantly, whom he hated not in time past; as when a man goeth into the wood with his neighbour to hew wood; and his hand fetcheth a stroke with the ax to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour that he die, he shall flee into one of these cities, and live."

The example here given, for illustrating the text, proves, in the clearest manner, that those only who committed homicide purely casual, were entitled to the benefit of the cities of refuge.

Nor is it of any moment, what was observed on the other side, that it was absurd to suppose that an innocent person should be obliged to fly into a city of refuge. The reason thereof is explained in the subsequent verse; "Lest the avenger of the blood pursue the slayer while his heart is hot, and overtake him." The Jews were prone to revenge, and, therefore, the sanctity of these cities of refuge was considered as necessary for protecting the person who had shed blood from the resentment of the friends of the person killed.

The pannel, in the next place, endeavoured to show, that, in the civil law, a distinction was established betwixt homicide flowing from premeditated malice, and that committed on suddenty, and that the latter was not punished capitally; but the pursuers, after making all the searches they can into that law, cannot discover that there is the least foundation for the distinction; on the contrary, whoever committed homicide *dolo malo*, whether deliberately, and upon forethought, or of suddenty, was to be punished *lege Cornelia de sicariis.*—*Dolus malus* is, by the law of every country undoubtedly essential to constitute the crime of murder; but it was sufficient, by the Roman law, as well as by the laws of every other country known to the pursuers, that the intention to kill, *antecedit ictum, licet non congressum.*

Intention, or the act of the mind, can only be known from external circumstances; and so the general rule laid down in the civil law was, that if the person killing struck with a mortal weapon, and death followed, he was justly held as a murderer. "Si gladium strinxerit, et in eo percusserit, indubitate occidendi animo id eum admisisse, *l.* 1. § 3. *ff. ad legem Corneliam de sicariis.*" Here the law does not require, that premeditated malice should be proved; but where death happens, by a wound given with a lethal weapon, the law has laid it down, that it is to be presumed that it was done with

a felo-

a felonious intention; and, as therefore, it muſt be conſtructed as voluntary ſlaughter, done *dedita opera*, the actor ought to be puniſhed capitally; and it was ſufficient that the ſtroke was given with a murderous intention, although that intention did not take its riſe from premeditated malice.

This doctrine is accordingly clearly laid down by *Vict. ad leg. Corn. de ſicariis*, § 9. *circa med.* After ſetting forth, that the huſband who killed his wife found in the act of adultery, was not to be puniſhed capitally, he proceeds in theſe words: "Cumque hoc ita in marito, per graviſſimam adulterii injuriam concitato, *jure ſingulari* conſtitutum ſit, aut ſubitò atque ſpontaneo iræ impetu concitatos, aut injuria dolore ad iram commotos, atque ita adverſarium occidentes, porrigendum non eſt; ſed potius ad ordinariam hi legis Corneliæ pœnam revocandi ſorent. Licet enim diſtincta hæc ſint, impetu et propoſito delinquere, non tamen ideo illi qui impetu delinquunt, extra dolum ſunt; quod uti probatum antea de iis qui per ebrietatem peccarunt. Ita etiam in illis, qui iracundiæ calore ſtimulati, cædem perpetrarunt, verum eſt, dum et in ira, neque judicium, neque aſſenſus animi, neque voluptas, deeſt."

Your lordſhips will likeways obſerve, from a paſſage formerly recited from the ſame learned author, that no provocation by words is ſufficient to excuſe *a pœna ordinaria*; and it is extremely plain that homicide committed upon ſuch provocation is underſtood to proceed from a ſudden heat of paſſion, and not from premeditated malice.

The *l.* 1. § 3. *ff. ad leg. Corn. de ſicariis*, was appealed to on behalf of the panneſt. It is in the following words: "Divus Hadrianus reſcripſit, eum qui hominem occidit ſi non occidendi animo hoc admiſit abſolvi poſſe; et qui hominem non occidit, ſed vulneravit aut occidat pro homicida damnandum et ex reconſtituendum hoc, nam ſi gladium ſtrinxerit, et in eo percuſſerit, indubitate occidendi animo id eum admiſiſſe. Sed ſi clavi percuſſet, aut cucuma in rixa quamvis ferro percuſſerit, tamen non occidendi animo, leniendam pœnam ejus, qui in rixa caſu magis quam voluntate homicidium admiſit." And they further appealed to *l.* 1. *cod. dict. tit.* which is in the following words: "Prætor veſter rectius fecerit, ſi ſe præſidi provinciæ obtulerit, qui ſi probaverit non occidendi animo hominem a ſe percuſſum eſſe, remiſſa homicidii pœna, ſecundum diſciplinam militarem ſententiam proferet. Crimen enim contrahitur, ſi et voluntas noſcendi intercedat, cæterum ea quæ ex improviſo caſu potius quam fraude accidunt, fato plerumque non noxæ imputantur."

But it is, with ſubmiſſion, inconceivable how the pannel can expect to receive any aid from theſe authorities: on the contrary,

trary, when they are duly conſidered, they eſtabliſh the very doctrine which the purſuers are endeavouring to maintain. Your lordſhips will obſerve, that the ideas of the Jewiſh law, above ſtated, are here adopted. Where the perſon killing, ſtruck with a weapon from which he had no reaſon to apprehend that death would follow, and where no previous enmity betwixt the parties did appear, or could be alledged, ſo that, upon the whole, no intention to kill could be preſumed, the law hath ſaid, that in ſuch caſes the puniſhment ought to be mitigated; but then the very ſame law hath ſaid, that where the perſon ſtruck with a lethal weapon, malice and intention to kill muſt unqueſtionably be preſumed, "ſi gladio percuſſerit, indubitate occidendi animo id eum admiſiſſe." And as in this caſe the pannel killed the earl by pouring a loaded muſket into his bowels, it is impoſſible to doubt, and the law does preſume, that it was done with the felonious intention of bereaving the earl of his life; and, of conſequence, nothing leſs than a capital puniſhment can, with any ſhew of reaſon or juſtice, be inflicted upon him.

The purſuers ſhall not trouble your lordſhips with running over any of the other authorities that were ſtated for the pannel upon this point. What has been ſaid affords a ſufficient anſwer to all and each of them. They only reſpect the caſe where homicide is committed in a fray; and where, from the weapons that were uſed, and the circumſtances of the caſe, it does not appear that the party had an intention to kill; the very contrary of which was clearly the caſe of this pannel.

With reſpect to the law of England, after what has been already ſaid upon another branch of the defence, it will be unneceſſary to trouble your lordſhips with much more upon it. The purſuers apprehend, that the law of England is clearly againſt the pannel upon this point; and that, were he to be tried in England, and the indictment proved againſt him, he would be found guilty of murder, and puniſhed with the pains of death.

The law of England has ſo far interpoſed in favour of human frailty, that where a perſon, in a ſudden tranſport of paſſion, upon juſt provocation received, kills his neighbour, the ſame is differenced from murder, and is only to be puniſhed as man-ſlaughter. But your lordſhips will obſerve, that taking the facts even as ſtated by the pannel, he cannot poſſibly bring himſelf under that predicament. It from thence appears, that it was not in the heat of paſſion, and in reſentment of provocation given, that the earl was killed; but, on the contrary, it does appear, that the pannel was perfectly maſter of himſelf upon the occaſion; that he accordingly, for

ſome

ſome time, retired from the earl with the muſquet preſented, and ready to be diſcharged; and that it was upon the earl's approaching near to him, that the pannel killed him, in proſecution of a determined purpoſe and reſolution, upon no account to quit his gun. It is a queſtion toſt by the writers upon the law of England, what time may be preſumed ſufficient for a man to cool, ſo as to render the crime wilful and intentional murder; but there is no room for that queſtion here, as it is clear from the pannel's own ſhowing, that he was never heated; that he was all along perfectly maſter of himſelf, and that the act he committed was not the reſult of his being overcome by a ſudden guſt of paſſion; but that it was truly the reſult of a fixed, determined, and deliberate purpoſe. Every caſe muſt be determined upon its own circumſtances; and it is humbly ſubmitted, if the circumſtances above noticed, all ariſing from the pannel's own ſtate of the facts, are not ſufficient to bring the crime according to the ideas of the law of England, under the denomination of wilful murder.

But, 2°. your lordſhips will obſerve, that, independent of theſe conſiderations, an eſſential ingredient is here wanting, in order to render the crime manſlaughter. The only provocation the pannel is alledged to have received, was merely verbal; the earl was all the time unarmed, and never touched the pannel's perſon.

This circumſtance alone is, by the law of England, ſufficient to render this crime murder, and not manſlaughter. If the earl had made an actual aſſault upon the pannel's perſon, and if a tuilzie had thereupon enſued, and the earl had been killed, there might have been a pretence for pleading, that the pannel, by the law of England, would only have been guilty of manſlaughter. But it appears from the authority of Mr. Juſtice Foſter, Blackſtone, and Hawkins, ſtated in a former part of this information, that no verbal injury, how grievous ſoever, is ſufficient to free the party killing from the guilt of murder, if the death was occaſioned by a lethal weapon. If the perſon provoked by a verbal injury ſhould, in return thereof, have ſtruck with a weapon not likely to kill, an intention to kill could not neceſſarily from thence be inferred; and the killing in ſuch caſe might be ruled manſlaughter only. The law of England, in this particular, ſeems to be founded upon the very ſame ideas with that of the Jews and of the Romans, already mentioned. But, where the wound is given with a lethal weapon, as in this caſe with a gun, which muſt neceſſarily preſume an intention to kill, the caſe, by the law of England, would be ruled murder, becauſe no verbal provocation whatever is ſufficient to free the party from the guilt of murder; and ſo where,

upon a verbal provocation, homicide happens, and where the killing appears clearly to have been intentional, the law in ſuch caſes rules it to be murder.

Sundry caſes might be ſtated from the law of England, for illuſtrating the difference betwixt murder and manſlaughter; but it will be unneceſſary to trouble your lordſhips with any of theſe in the preſent caſe. The general principles above laid down are uncontroverted, and are clearly ſufficient for determining the preſent queſtion.

It was, in the laſt place, maintained upon the part of the pannel, that the diſtinction already ſtated betwixt murder committed upon forethought, and homicide committed upon ſuddenty, took place in the law of Scotland; that the former only was capital, but that the latter, as being only *homicidium culpoſum*, was to be puniſhed arbitrarily; and that, as this diſtinction took place in the old law of Scotland, ſo it was not taken away by the ſtatute 1661.

But the purſuers humbly apprehend, that this diſtinction is not founded in the law of Scotland; that, at no period, wilful homicide, though committed without forethought, felony, and premeditation, was puniſhed arbitrarily; and that if ever the law ſtood otherwiſe, it was clearly ſo far altered by the ſtatute 1661.

With reſpect to the firſt point, it appears from ſundry of our old ſtatutes, that wilful and intentional homicide was at all times puniſhed with death, without diſtinction. By *chap.* 3. *1ſt ſtatute of Robert* I. intituled, "Men condemned to the death ſhould not be redeemed," it is ſtatute and ordained, "Gif any man, in any time coming or bygane, what condition or eſtate he be, is convict or attainted of ſlaughter, reif, or of any other crime touching life and limb, common juſtice ſhall be done upon him, without any ranſom, ſaving the king's power, and alſo the liberties, ſpecially given and granted by the king that now is, and his predeceſſors, to the kirk and kirkmen, and other lords."

Here ſlaughter in general is mentioned, and juſtice was to be done upon the perſon convicted or attainted of it; and the puniſhment by the title was plainly death, ſo that by the law of Scotland, ſlaughter in general was capital, without diſtinction.

By *chap.* 43. *of the ſtatute of king Robert* III. it is ſtatute, "That nae man uſe any deſtruction, hairſhips, burning, reif, *ſlaughter* in time to come, under the pain of tinſel of life and goods moveable."

Here the pain of death is likewiſe declared to be the puniſhment of ſlaughter in general, without diſtinction. And in the immediate ſubſequent chapter, the ſheriff was to take diligent

diligent inquiſition of deſtroyers of the country, or ſuch as had deſtroyed the king's lieges with heirchippis, ſlaughter, *&c.* and was to take bail from them, if arreſted, to compear at the nixt juſtice Aire; and, if bail was not given, the ſheriff was to put him to the knowledge of an aſſize; and gif he be taint with the aſſize for ſick an treſpaſſon, he ſhall be condemned to death. This can only relate to man-ſlaughter, and not to murder, upon forethought felony, which was one of the pleas of the crown to be tried only before the king's juſticiar, whereas ſlaughter might be tried by the ſheriff, where there was a certain accuſer, as appears from *book* 1. of the *Majeſty*, *cap.* 1. § 8.

In like manner, the cap. 2d. of the ſtatutes of Alexander II. does plainly preſuppoſe, that ſlaughter, without diſtinction, was capital; and, accordingly, Skene, in his Treatiſe of Crimes, tit. 2. cap. 6. a book of the higheſt authority, lays it down, "That manſlaughter, committed voluntarily, be forethought felony, or caſually by *chaude melle*, generally is puniſhed by death, and confiſcation of the moveable goods pertaining to the treſpaſſer; ſo that the girth or ſanctuary is nae refuge to him who commits ſlaughter be forethought felony; but he ſhould be delivered to the judge-ordinary, to underlie the law."

Here it is plainly laid down, that manſlaughter, whether committed by forethought felony, or on ſuddenty, is puniſhed with the pains of death; with this difference, that the girth or ſanctuary was no refuge to him who commits ſlaughter by forethought felony, but he was to be delivered to the judge-ordinary to underlie the law; which is expreſly enjoined by act 23, parliament 4 James V. whereby maſters of the girth are ordained to deliver up to juſtice, to underlie the law for their crime, ſuch perſons as are guilty of murder, upon forethought felony.

It was upon this ſtatute, and others to the ſame purpoſe, that the counſel for the pannel endeavoured to eſtabliſh a diſtinction betwixt manſlaughter upon forethought felony, and ſuch as was committed on ſuddenty. They contended, That, as the maſters of the girth were directed and ordained to deliver up to juſtice ſuch only as were guilty of murder upon forethought felony, that therefore homicide, committed on ſuddenty, was not capital.

But the purſuers do humbly beg leave to maintain, that the concluſion does by no means follow from the premiſſes; for although murder, in every degree, does juſtly merit the pains of death, yet murder, as well as other crimes, does admit of different degrees of aggravation; and indeed there can be no doubt, that the man who cooly and deliberately

meditates the death of his neighbour, and executes his purpose accordingly, is more criminal in the sight of God, than the person who, in a sudden start of passion, puts his neighbour to death; and, therefore, all that is proved by those statutes is no more than this, that those who were guilty of murder, so aggravated, were not entitled to the benefit of the sanctuary, but the masters and keepers thereof were bound to deliver them up to justice; whereas those who were only guilty of murder upon suddenty were entitled to the benefit of the sanctuary, and could not be delivered up.

And it will by no means from thence follow, that, because the girth or sanctuary was a protection to them from punishment, that therefore, if they did not resort to the sanctuary, they were not punishable; or that the pains of death were not to be inflicted, in case they were apprehended and convicted, before retiring to the sanctuary. The counsel for the panel adduced no authority to prove this; and yet, unless they prove this, they plainly prove nothing. There is no inconsistency in supposing that a crime should be capital, and at the same time there should be a sanctuary which afforded the guilty person a protection against punishment; and, indeed, it clearly appears from cap. 6. of the statutes of Alexander II. That criminals who resorted to, and took sanctuary in, churches, had protection, though their crimes were capital. It is there statute, "Anent thieves and riefers, who flys to haly kirk, that, gif any of them, moved with repentance, confesses there that he has heavily sinned, and, for the love of God, is come to the house of God for safety of himself, he shall have peace in this manner, that is, that he *shall not tyne life nor limb*, but what he hath taken frae any man he shall restore sae meikle to him, and shall satisfy the king, according to the law of the country, and sua shall swear, upon the holy evangil, that thereafter he sall never commit reif nor theft." And, in the last paragraph of that chapter, it is said, "Mairover, *man-slayers*, traitors to their masters, and they who are challenged of murder or treason, sall be lawfully accused thereanent, and gif they, in manner foresaid, fly to the kirk, the law aforesaid sall be kept and observed to them."

It is from this statute plain, that the girth or sanctuary was a protection to criminals who had committed the most atrocious crimes, and such which were clearly punished capitally. There can be no doubt, that those guilty of murder or treason were, at the period of the foresaid statute, liable to be punished capitally, if they did not fly to holy kirks; and therefore, although by subsequent statutes, those guilty of aggravated murder, *viz.* such as was committed upon forethought

thought felony, were deprived of the benefit of the ſanctuary, yet all other crimes remained upon their former footing. What were capital before, remained capital ſtill, and ſuch as were guilty thereof, if they did not fly to the ſanctuary, could be capitally puniſhed. And accordingly Sir George Mackenzie, in his obſervations upon act 90, parl. 6 James I. expreſly lays it down, "That murder, though committed without forethought felony, is puniſhable by death, except it was either caſual or in ſelf-defence, and then it is called properly homicide, or manſlaughter."

But it is unneceſſary to make any further enquiry how the law of Scotland ſtood in this particular in ancient times, becauſe, with ſubmiſſion, it cannot admit of a doubt, that ſince the 1661, the committers of wilful homicide are liable to a capital puniſhment, without diſtinction, whether it was committed upon forethought or upon ſuddenty.

The act 22 parl. 1661, "For removing of all queſtion and doubt that may ariſe hereafter in criminal purſuits for ſlaughter, ſtatutes and ordains, that the caſes of homicide after following, *viz.* caſual homicide, homicide on lawful defence, and homicide committed upon thieves and robbers, breaking houſes in the night, or in caſe of homicide, the time of maſterful depredation, or in the purſuit of denounced or declared rebels for capital crimes, or of ſuch who aſſiſt and defend the rebels, and maſterful depredators by arms; and by force oppoſe the purſuit and apprehending of them, which ſhall happen to fall out in time coming, nor any of them ſhall not be puniſhed by death; and that notwithſtanding of any laws and acts of parliaments, or any practique made heretofore, or obſerved in puniſhing of ſlaughter. But that the man-ſlayer, in any of the caſes aforeſaid, be aſſoilzied from any criminal purſuit purſued againſt him, for his life for the ſaid ſlaughter, before any judge criminal within this kingdom; providing always, that in the caſe of homicide caſual, and of homicide in defence, notwithſtanding that the ſlayer is by this act free from capital puniſhment, yet it ſhall be leiſome to the criminal judge, with advice of the council, to fine him in his means, to the uſe of the defunct's wife and bairns, or neareſt of kin, or to impriſon him."

One of the pannel's learned counſel was pleaſed to obſerve, that the word *caſual*, which occurs in this ſtatute was not an Engliſh word, that it was to be found in no Engliſh dictionary, and by giving it a Latin derivation, he endeavoured to ſhow, that it was broad enough to comprehend the caſe of *wilful* homicide, committed without forethought felony.

The

The purſuers ſhall not trouble your lordſhips with following the pannel's learned counſel in his many ingenious criticiſms. It is ſufficient to ſay, that the word *caſual* is well known in the language of the law of Scotland, and muſt have been underſtood by the legiſlature when uſed in the aforeſaid ſtatute; and that it is equally well known in the language of our neighbouring country, appears from moſt of the Engliſh dictionaries, and particularly Johnſon's; and, therefore, the criticiſms built upon this capital miſtake muſt all fall to the ground. The purſuers ſhall not enter into a critical examination of the derivation of the word *caſual*. It is a word perfectly well underſtood; and caſual homicide, in their apprehenſion, carries along with it a very different meaning from homicide wilfully and felonioufly committed, though not proceeding from malice long premeditated.

It was further obſerved upon this act, with regard to caſual murder, that having been firſt paſſed during the uſurpation, in the parliament 1649, and another act having been made the ſame day, declaring that there ſhould be no remiſſions in capital crimes, it could not be ſuppoſed that murder upon ſuddenty, without premeditated malice, was underſtood to be a capital crime, and unpardonable; from which it was inferred, that when the ſame ſtatute was re-enacted in the year 1661, it could not be intended that this crime ſhould be capital. But this argument is extremely inconcluſive; for although it was thought proper during the uſurpation, to paſs an act declaring capital crimes unpardonable, yet it was not thereby intended to alter the general nature of crimes, or to make thoſe not capital which formerly were ſo.—The act extends to all capital crimes whatever, many of which were attended with a much leſs degree of guilt than wilful murder, tho' committed upon ſuddenty; for example, theft, robbery, hameſucken, *&c.* So that the argument goes a great way too far, in ſuppoſing that no crime leſs than murder, upon forethought felony, was underſtood to be capital and unpardonable: and beſides, as the act here founded on was not renewed after the Reſtoration, it is now out of the queſtion.

It was further ſaid for the pannel, that though, in the caſes mentioned in the ſtatute, the law ordained homicide not to be capital, yet it is neither ſaid, nor ſuppoſed that the former law, whereby pannels were intitled to plead againſt a capital puniſhment, was thereby abrogated; and that ſundry caſes might be ſtated which did not fall directly under the exceptions mentioned in the ſtatute, and where yet it could not be diſputed that a capital puniſhment would not fall to be inflicted.

The

The purſuers have no occaſion in this caſe to plead, that perſons guilty of wilful homicide committed without forethought felony, were by this ſtatute deprived of a defence which was competent to them before the ſtatute was made; they do apprehend that ſuch homicide was puniſhed capitally before the ſtatute, as well as after it. At the ſame time, if the law had ſtood otherways, it canot well be doubted, that upon a ſound conſtruction of the ſtatute, ſuch homicide would thereafter have fallen to be puniſhed capitally; for when the declared intention of the ſtatute was to remove all *doubts* and queſtions that might thereafter ariſe concerning purſuits for *ſlaughter*; and when in removing theſe doubts, it makes particular mention of homicide in lawful defence, and homicide committed upon thieves and robbers, or in the time of maſterful depredations, *&c.* as not liable to a capital puniſhment, it is, with ſubmiſſion, impoſſible to ſuppoſe, that if the legiſlature had meant and intended that wilful and intentional homicide committed on ſuddenty was not to be puniſhed capitally, it would not have been particularly mentioned. It can never be imagined, that when the legiſlature, for the purpoſe of removing all doubts and queſtions, was anxiouſly enumerating a variety of caſes where death was not to be inflicted, that they would have omitted a caſe which the pannel himſelf muſt admit was a hundred times more doubtful than any of theſe particularly mentioned. It would be, with ſubmiſſion, abſurd to ſuppoſe, that the legiſlature would have enacted in the caſes that were more clear, and have left the moſt difficult of them in the dark; as ſurely the greateſt advocates for ſlaughter on ſuddenty, muſt admit, that it is much more culpable than any of the other ſpecies of homicide mentioned in the ſtatute.

The purſuers ſhall not maintain, that the ſtatute is to receive ſo *judaical* a conſtruction, as that every other homicide which does not fall directly within the ſtrict letter of the ſtatute, was to be puniſhed capitally. Other caſes might, no doubt, be figured, which, though they do not fall within the words, do fall within the ſpirit of the ſtatute. The legiſlature has therein made an enumeration of ſundry particulars, which are ſufficient to explain the nature of the caſes which do not fall to be capitally puniſhed; and, as wilful and intentional homicide, though committed on ſuddenty, is, in its nature, totally different from all and each of the caſes mentioned in the ſtatute, the purſuers may fairly conclude, that upon no juſt conſtruction of the ſtatute, this caſe can be brought under either the words or ſpirit of it.

The

The purſuers ſhall now proceed to ſtate a few caſes, in order to ſhow your lordſhips, that the law of Scotland has been underſtood to be agreeable to what has been maintained on their part, and that before and after the ſtatute of 1661.

In the caſe of Bruce *contra* Marſhall, the 3d of April 1644, ſlaughter was libelled, and he was condemned upon his own judicial confeſſion, from which it appears that he was ſo far from having any forethought, that he ſuffered not only the greateſt provocation in words, but was even beat with hands and feet by the defunct, while he was on the ground; but, at laſt, getting up, and (as the confeſſion bears) being overcome with paſſion, he drew a knife, and ſtruck at him in two ſeveral places of his body, whereby he died; and upon this confeſſion, where there was a ſuddenty, provocation, and paſſion, he was brought in as guilty, and condemned to be beheaded.

In the caſe of Murray *contra* Gray, 10th June 1678, the lords found the libel relevant, and that there was no neceſſity of any diſtinct probation for proving *precogitated malice*, which clearly ſhews, that homicide, though not upon forethought, was capital.

In the caſe of Aird, who was indicted in the year 1693, for the murder of Agnes Bain, having given her ſome ſtrokes on the ſide and belly with his foot, by which ſhe fell into fainting-fits, and immediately died. The defence was great provocation and caſual homicide.—Provocation, in as far as ſhe threw a chamber-pot in his face, and when he gave her hard words, ſhe and her neighbour fell upon him and beat him, upon which he gave her the ſtrokes above-mentioned; and in that trial it was argued, that there was no *animus occidendi*; no previous malice nor mortal weapon; and the arguments urged in defence of the preſent pannel, were pleaded for the pannel in that caſe: nevertheleſs, the lords found the libel revelant, repelled the defences, and, upon the proof, he was ſentenced to die.

In the year 1695, George Cumming, writer in Edinburgh, was indicted for the crime of murder or manſlaughter of Patrick Falconer. The defence now offered for the pannel, upon the diſtinction between forethought and *chaude melle*, was there pleaded; nevertheleſs the libel was found relevant, and the jury returned a verdict *guilty of man-ſlaughter*. Upon which he was condemned *to die*.

In the caſe of Hamilton of Green, 30th June 1716. The pannel offered to prove, that he was accidentally at the houſe of Thomas Arkle, of whoſe murder he was accuſed, upon

the day libelled, with some of his acquaintances, and had no deadly weapon along with him: that he became intoxicated to a great degree, and having left the house, and returned to ask for the slip or cover of the sheath of a sword, the defunct gave him most indecent, injurious, and scurrilous language; and, persisting in it, the pannel pushed, or struck at him with his sword, having the scabbard thereon, which he had reason to believe had a cramper upon it; and, being still more and more provoked, by repeated injurious words, to protect himself from farther insolence, which he had reason to look for, the pannel still remaining on horseback, the defunct rushed himself upon the sword: and this circumstantiate fact was offered to be proved; nevertheless, the libel was found relevant, and the pannel's whole defences repelled; and, upon the proof, he was sentenced to have his head severed from his body, and was accordingly beheaded.

In the case of Thomas Ross and Jeffrey Roberts, 20th July 1716, it was urged for the pannels, That, being recruits, lately come from England to Scotland, and not knowing the way, they asked the defunct the road to Edinburgh, who refusing to show it, and one of the pannels expostulating with him, why he treated a stranger so, that came to serve the king? he uttered very disrespectful words, with respect to his majesty; and one of the pannels having called him villain, for such opprobrious expressions, he came up to Ross, and, with his fist, gave him a blow on the face, and then pulled him down to the ground, and beat him with a great stick, to the *imminent danger of his life*, saying, that he should never go alive out of his hands; and Roberts having come to his assistance, and relieved him a little, Ross, the pannel, gave the defunct a wound with a knife, whereof he died. Ross pleaded, There neither was, nor could be, forethought felony or premeditated malice against a person whom he had never seen before: that it was committed upon suddenty: that he had the highest provocation, both verbal and real; nevertheless, by the interlocutor, Ross, the pannel, his giving the wound, was found relevant to infer the pain of death. And the defence from provocation by words, and receiving a blow on the face, being pulled down to the ground, and beat, *with a great stick, to the danger of his life*, jointly sustained relevant to restrict the libel to an arbitrary punishment, was found to be elided by the reply; that, at the time of giving the wound to the defunct, the defunct's hands were held by Jeffrey Roberts, the other pannel. From this it is evident, that slaughter, upon suddenty, and by a person who had received the greatest ver-

bal, and even real injuries, is, by that interlocutor, found to be capital.

Many other cases might be mentioned; but these are sufficient to shew, that *wilful homicide*, by the law of Scotland, has been always understood to be punishable with the pains of death; and that the pains of death have uniformly been inflicted upon that crime; and that, whether it was committed upon suddenty, or upon forethought felony.

Certain cases were mentioned on behalf of the pannel, in order to establish a distinction betwixt homicide, committed on suddenty, and upon forethought felony; and to prove, that the latter only, and not the first, does, by the law of Scotland, admit of a capital punishment. But, when these cases are duly considered, the pursuers are humbly persuaded your lordships will be of opinion, that they do by no means prove what is intended to be established by them.

The first case appealed to, was that of Elizabeth Elphinston, and his majesty's advocate, against captain William Bruce of Auchinhowie, in the year 1709. Captain Bruce was there indicted for the murder of Charles Elphinston of Airth. They had been together at my lord Forrester's house at Torwoodhead,—where they appeared to be in friendship together; but, on their way home, a quarrel arose betwixt them, and Mr. Elphinston was killed. Sundry defences were stated for the pannel; and, among others, he pleaded her majesty's act of indemnity, in bar of the prosecution. To which it was answered, That wilful murder was excepted from the Act of Indemnity, and therefore it could not avail the pannel.

To this it was replied, That the exception in the Act of Indemnity did only respect murder done upon forethought and premeditated design; and that, although the indictment did libel in general terms forethought and premeditation, yet as no circumstances were condescended upon, from whence the same could be inferred, it could only be considered as slaughter committed on suddenty, which did not fall under the exception of the Act of Indemnity. And the court, upon advising mutual informations, "sustained the defence of her Majesty's most gracious Act of Indemnity, proponed for the said pannel, relevant to elide the said libel, and therefore deserted the diet thereof against him, *simpliciter*, dismissed him from the bar, and discharged him to be farther troubled for the said crime in time coming."

It is submitted, If this case is at all to the purpose, it does indeed prove, that your lordships predecessors were of opinion, that the exception in the Act of Indemnity did only com-

comprehend the case of murder upon premeditated malice; and that, in the case libelled, there was not sufficient circumstances condescended upon to bring the crime charged under that denomination; but it will by no means from thence follow, that the court was in that case of opinion, that, laying aside the Act of Indemnity, the crime charged could not be punished capitally. It has been already observed, that although murder, in every degree, deserves the pains of death, that yet the crime admits of different degrees of aggravation; and therefore the legislature might, with great propriety, pardon murders committed upon a sudden quarrel, and, at the same time, not pardon such as were coolly and deliberately meditated.

The next case mentioned on the part of the pannel, was that of William Hunt, dragoon in Sir Richard Temple's regiment, who was indicted for the murder of Henry Macmillan, flesher in Dalkeith, in the year 1711. It was in that case alledged, in defence for the pannel, that a mob had arose in the town of Dalkeith, which was headed by the defunct, and attacked some of the soldiers who were quartered in that town, and proceeded so far as to beat them, throw them down in the street, trample them upon the ground, and otherwise maltreat them in a barbarous and cruel manner, to the effusion of their blood; that the pannel having been at that time upon the guard, he was called out by the serjeant who commanded the guard to quell the mob, and relieve the persons who were so attacked and abused; and that it was in this tulzie that the defunct, who headed the rabble, was killed; and from thence it was argued on behalf of the pannel, that as he, at the time libelled, was one of the guard upon duty, and was ordered out under arms, to quell a mob, and relieve his fellow-soldiers, who were in no small danger, from the fury and insolence of the rabble; that what blows he gave on that occasion were lawfully given. 2*do*, It was alledged, that what was done was in necessary defence, either of himself, or of the other dragoons who had been thus attacked; and that, supposing he had been guilty of any excess, he could only be subjected to an arbitrary punishment; and, *separatim*, it was pleaded, that as the defunct was killed *in rixa*, whereof he was himself the author, the pannel could not be subjected to the pains of death, the more especially, as it appeared that the pannel could have no *animus occidendi*, for that, notwithstanding he was armed both with a sword and a musquet, he did not use his musquet, in the manner that was most certain to kill, but only struck with the but-

end of it: and the court, upon advising mutual informations, pronounced the following judgment: "Find the said William Hunt, pannel, his going behind Macmillan, the defunct's back, while standing peaceably in the street, without arms, and knocking him down, by a stroke upon his head with the but-end of his musquet, whereof he died next day, relevant to infer the pains of death, and confiscation of moveables; and find this defence, *viz.* that there being a tumult in Dalkeith, in which some of the dragoons were maltreated, or troden down; and the pannel being upon the guard under duty at the time, was commanded out for quelling the said mob and tumult, and relieving the dragoons; and that the defunct, Macmillan, having been in the rabble and tumult, which attacked that party of the guard commanded out, or any of them, before the stroke was given, relevant to assoilzie the pannel *simpliciter*, and elide the libel; and *separatim* find, that the stroke being given *in rixa*, or a tumult, where the defunct was author of the tumult or *rixa* himself, or that the stroke was given in defence of the pannel, or any of his fellow-soldiers, when attacked, relevant to restrict the libel to an arbitrary punishment."

It is humbly submitted to your lordships, with what propriety this judgment is appealed to, in order to establish the general proposition maintained by the pannel, *viz.* that wilful homicide, if committed on suddenty, without premeditated malice, is not punishable with the pains of death. If the pursuers rightly understand the case, it proves the very reverse; premeditated malice was not so much as libelled; nor was a single circumstance condescended on in the indictment, from which forethought felony could be inferred; and yet the libel, as laid, is found relevant to infer the pains of death.

Nor does the latter part of the judgment in the least impugn the doctrine maintained upon the part of the pursuers. The judgment restricting the libel to an arbitrary punishment, is laid upon this, that the defunct himself was the *auctor rixæ*, and there seems to be little doubt that the judgment is founded in law. When the defunct himself had raised a mob, who where beating and abusing the soldiers in a cruel and barbarous manner, to the effusion of their blood, it would have been a hard case if the pannel, acting in defence of himself and his fellow-soldiers, should suffer the pains of death, because he killed the person who headed the mob, the more especially, when it does appear from the circumstances of the case, that he had no intention to kill. He only gave a stroke with the but-end of his musquet, which, though it no doubt might

might kill, yet it was the weapon the leaſt lethal of any he was then poſſeſſed of. If he had intended to kill, he infallibly would either have fired with his muſquet, or uſed the ſword which he had at his ſide.

The next caſe mentioned upon the part of the pannel, was that of Peter Maclean, in the 22d January 1710, indicted for the murder of James Ewing. In which caſe the court pronounced the following judgment: "Find the indictment relevant to infer the pains of death, and ſuſtain the defence propponed for the pannel, in theſe terms, viz. that the defunct quarreled the pannel under the name of raſcal, how he durſt carry a fowling-piece, and that, if the prince had his own, he durſt not ſo do; and adding theſe words, that her Majeſty was but a whore, and thereupon aſſaulted the pannel for taking the carabine from him, relevant to reſtrict the libel to an arbitrary puniſhment."

Upon this caſe it is obſervable, that although the indictment does not libel premeditated malice, nor condeſcend upon a ſingle circumſtance from which the ſame could be inferred, (as indeed the pannel was not ſo much as of the defunct's acquaintance) yet the libel was found relevant to infer the pains of death; and therefore the purſuers apprehend, that it is truly a judgment in favour of the doctrine maintained upon their part.

And as to the defence, which was there ſuſtained relevant to reſtrict the libel to an arbitrary puniſhment; it is founded upon very peculiar circumſtances, and cannot well be drawn into a precedent for determining other caſes, far leſs for determining a very general and very important point of law.

At the ſame time, very ſtrong reaſons did there concur for the reſtriction: for, beſides the high verbal provocation he received, an aſſault was truly made upon him, in order to rob him of his muſquet.—As he did not know the defunct, he had reaſon to apprehend, that the attack was made with a felonious intention, and conſequently intitled to reſiſt it; and, he was particularly called upon in duty, as a ſoldier, not to part with her Majeſty's arms, with which he was intruſted; and, it appears, that when he fired, it proceeded from real apprehenſions of danger; for he ſhowed an unwillingneſs to kill, having firſt endeavoured to defend himſelf, by clubbing his muſquet.

The next caſe which was mentioned for the pannel, was the noted caſe of Finhaven. But, in what ſhape the pannel can avail himſelf of it, is to the purſuers inconceivable. The circumſtances of that caſe are well known to all your lordſhips, and

and therefore need not be particularly ſtated. The interlocutor of the court, upon adviſing very learned and elaborate informations, is in theſe words: "Find, that the pannel, at the time and place libelled, having, by premeditation, and forethought felony, with a ſword, or other mortal weapon, wounded the deceaſed Charles, earl of Strathmore, of which wounds he, the ſaid earl, ſoon thereafter died, or that he, the pannel, was art and part thereof, relevant to infer the pains of law; but allow the pannel to prove all facts and circumſtances he can, for taking off the aggravating circumſtances of forethought and premeditation: as alſo, find, that he, the ſaid pannel, time and place foreſaid, having with a ſword, or other mortal weapon, wounded the ſaid deceaſed earl, of which wound his lordſhip ſoon died, or that he, the pannel, was art and part thereof, ſeparatim relevant to infer the pains of law, and repel the defences proponed for the pannel."

This, in the purſuer's apprehenſion, is a clear deciſion againſt the pannel, as to the point now in diſpute.—Notwithſtanding that all the arguments which are now urged on behalf of the pannel, were there pleaded with great ingenuity; yet the defences were repelled, and the pannel's killing the deceaſed earl, with a ſword, or other mortal weapon, was, independent of premeditation and forethought felony, found relevant to infer the pains of law, which clearly cuts down the diſtinction now endeavoured to be eſtabliſhed.

The laſt caſe which was mentioned on this point, in behalf of the pannel, was that of lieutenant Robertſon, in the year 1758, indicted for the murder of lieutenant Robert Ewing. But the purſuers are at a loſs to diſcover for what purpoſe that caſe is mentioned. The defence which was pleaded in that caſe was *ſelf-defence*, and which, indeed, was very ſtrongly qualified; and the interlocutor pronounced by the court was in theſe words: "Find the indictment relevant to infer the pains of law, but allow the pannel a proof of all facts and circumſtances that may tend to his exculpation, or alleviation of his guilt."

This interlocutor was very properly adapted to the caſe, without ſuppoſing any diſtinction betwixt ſlaughter on forethought felony, and on ſuddenty. If the pannel proved his defence to its full extent, it was ſufficient to exculpate; and although he ſhould have failed in proving, that lieutenant Ewing's death was abſolutely neceſſary to preſerve his own life, yet if he proved that he was *in periculo vitæ conſtitutus*, this might be relevant to alleviate.

Upon

Upon the whole, the purſuers are humbly perſuaded, that your lordſhips will be of opinion, that there is no relevancy in any of the defences proponed for the pannel, except in ſo far as he alledges that the earl was killed by accident, and not intentionally; and therefore, that your lordſhips, *quoad ultra*, will repel the pannel's defences, find the libel relevant, and remit the pannel, with the indictment, as found relevant, to the knowledge of an aſſize.

In reſpect whereof, &c.

RO. MACQUEEN.

INFORMATION

FOR

MUNGO CAMPBELL,

Late Officer of Excise at SALTCOATS,

In a CRIMINAL PROSECUTION before the

HIGH COURT of JUSTICIARY in SCOTLAND,

For the alledged Murder of the late

ALEXANDER Earl of EGLINTON:

ARCHIBALD, now Earl of EGLINTON,

AND

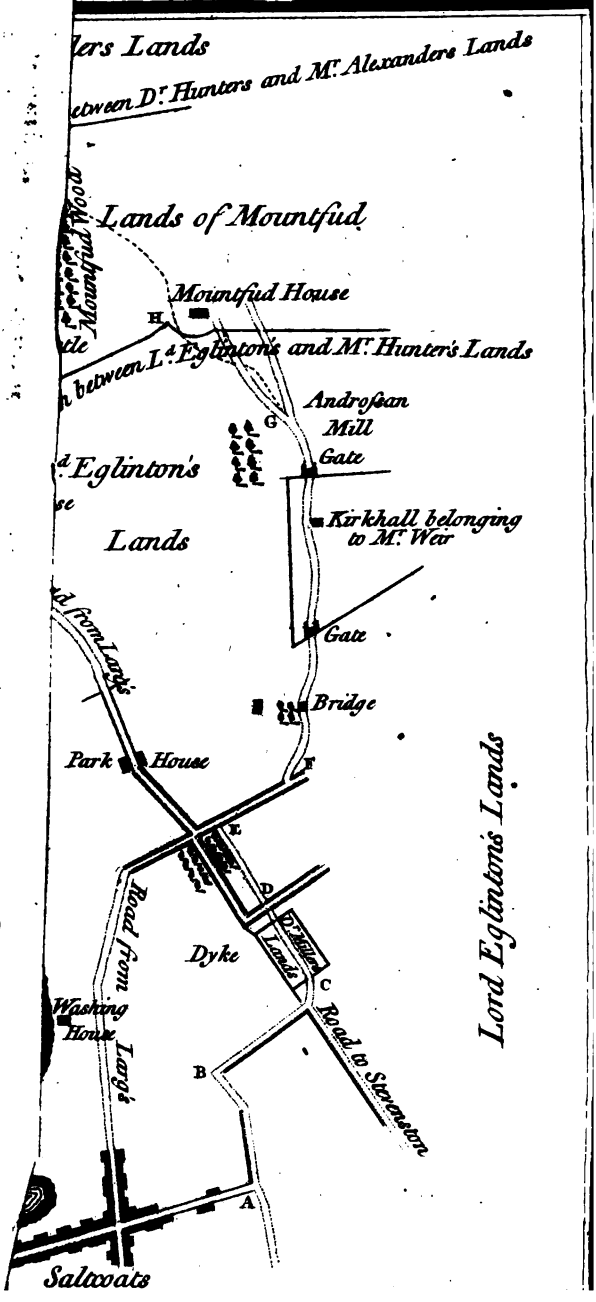
JAMES MONTGOMERY, Esq.

His Majesty's Advocate,

PROSECUTORS.

Z

ds from Saltcoats to Largs Kirkhall &c.



January 22, 1770.

INFORMATION

FOR

MUNGO CAMPBELL,

late Officer of Excise at *Saltcoats*, now Prisoner in the Tolbooth of *Edinburgh*, Panel;

AGAINST

ARCHIBALD EARL of EGLINTON,

AND

JAMES MONTGOMERY, Esq;

his MAJESTY'S Advocate, for his MAJESTY'S Interest, Prosecutors.

THE purpose of this information is to shew that the indictment is not relevant, or, in other words, that the facts charged in it are not sufficient to infer the conclusion.

In the argument upon this question, it must be supposed, no doubt, that the facts set forth in the indictment are true; the panel, however, before entering upon the reasoning, thinks it his duty to premise a short account of himself, his family and conduct, with a full and fair detail of the circumstances of

the unhappy accident that has brought him to trial for his life. Such explanations, on his part, are proper and neceſſary; as they will open what will be the nature of the exculpatory evidence, in caſe this indictment ſhall go to proof; and as they will contradict and confute the injurious miſrepreſentations with which, ever ſince his confinement, infinite pains have been taken to load him.

The panel was born at Air in 1712. He was one of twenty-four children. His father was Mungo Campbell, late Provoſt of Air; a man much reſpected in his time as a merchant and a magiſtrate. He had likewiſe the advantage of moſt honourable birth, being deſcended, both by father and mother, of the ancient and noble families of Ceſſnock (now Marchmont) Loudon, and Argyle.

The panel's father traded to what was a very great extent in thoſe days, but he was not ſucceſsful: On one bottom that periſhed at ſea, he loſt 30,000 merks, a great ſum at that time; and he met with many other loſſes afterwards, which, with the expence of maintaining a family uncommonly numerous, greatly reduced his fortune; ſo that he died in very indifferent circumſtances, and his children were diſperſed among the ſeveral relations and friends of the family.

The

The panel, who was an infant at his father's death, was taken care of by his godfather, Cornet Mungo Campbell: That gentleman died ſome few years after the panel's father, and had the kindneſs to bequeath the panel, by his latter-will, 1000 merks, and to recommend him to the protection of their common kinſman, Mr. Campbell of Nother-place, who took him into his family, and educated him, as he did his own ſons, till he was about 18 years of age.

The panel determined to go into the army, as he had not money to carry on trade, or breed him to any of the learned profeſſions; and an additional motive was, that he had a couſin, Hugh Campbell, who had entered a cadet in the regiment called the Scots Greys; which regiment too was at that time commanded by a gentleman who was the panel's nameſake and diſtant relation. On theſe accounts the panel fondly hoped, that his good behaviour might attain preferment; but in this he was diſappointed; for twelve long years did he ſerve, and expoſe himſelf in the battle of Dettingen, and other engagements, unrewarded. This was the caſe too with ſeveral others, and particularly Henry Lyon of of the Strathmore family, and his couſin, Hugh Campbell, who ſerved 28 years in the ſame regiment, without being advanced; which at laſt made him leave it in diſguſt,

and go a volunteer to Carthagena, with the late Lord Cathcart, where he was killed. The panel's diſappointment was no doubt chiefly owing to certain circumſtances, which gentlemen who have been in the army will be at no loſs to underſtand; they know well that neither merit or connections are always ſufficient to obtain preferment. The panel was once, however, offered a Quarter-maſter's place, which was worth 300 l. Sterling, if he would advance 100 l. for it. The panel had not the money himſelf, nor could he think (ſuch was his temper) of ſoliciting a loan from ſtrangers, or even blood-relations, if not very near. He had a ſiſter who was married to a man of ſubſtance; to her he applied for the ſum, but ſhe either could not, or would not, advance it; upon which the panel, diſguſted and diſappointed, applied for, and obtained his diſcharge from the ſervice, which is as follows:

" By Major Alexander Forbes, of his Ma-
" jeſty's royal regiment of North-Britiſh
" dragoons, commanded by the honour-
" able Lieutenant-General Sir James
" Campbell.

" Theſe are to certify, that the bearer, " Mungo Campbell, hath ſerved in General " Campbell's troop of the ſaid regiment for " the ſpace of twelve years, honeſtly and " faithfully; but by earneſt ſolicitation, and

" at

" at his own requeſt, is hereby diſcharged " from any further ſervice, he having re- " ceived his full pay, arrears of pay, and " all juſt demands, during his ſaid ſervice, " and four weeks pay to carry him home. " Given under my hand and ſeal, at Ghent, " this fourth day of December 1744.

" AL. FORBES."

The panel ingroſſes this diſcharge, becauſe, among the many aſperſions that have been thrown upon him, this was one, that he had been drummed out of the brave and honourable regiment of Scots Greys on account of groſs miſconduct and miſbehaviour.

Upon obtaining his diſcharge the panel returned to Scotland in 1745, when he found his countrymen in arms againſt one another. His chief and kinſman, the Earl of Loudon, did him the honour to countenance him, and the panel accompanied his lordſhip to the Highlands in that year. After their return, Lord Loudon procured him a commiſſion as an officer of exciſe, with a recommendation, which the panel earneſtly deſired, to ſtation him ſomewhere in Ayrſhire, that he might be near his friends, his relations, and his native ſpot, to which he has all along felt the warmeſt attachment.

Upon this duty he entered in 1746, and was firſt ſtationed at Newmills in Ayrſhire,

from

from which he was removed to Stewarton, from Stewarton to Irvine, and from Irvine to Saltcoats; all places in the ſhire of Ayr, in which the panel choſe to remain on account of his love to the *natale ſolum*. This was one reaſon why he was not raiſed to a higher ſtation; his incapacity to ſolicit, perhaps, was another: But the panel would rather have choſe to remain in the humble ſtation he held in Ayrſhire, or near it, than to have roſe to a higher, that would have obliged him to reſide elſewhere. Beſides, his duty in Ayrſhire was attended with very little trouble and fatigue, to which he very probably might have been expoſed in acting as a ſuperior officer in another place, for which he was very unfit at that time, having had his health impaired by the hard duty abroad, which brought on a diſorder in the lungs; and having had the misfortune to break a leg ſome years after his return home.

The character of an exciſe officer is by no means popular in this country, yet the panel conducted himſelf ſo as to be well liked and countenanced by all ranks of people. To the poor he cannot ſay he was liberal, for he had but little to give. His income was narrow; but as he had no family, till very lately, he had ſomething to ſpare. What he gave, trifle as it was, he gave with compaſſion and kindneſs; it was gratefully received; and he muſt do them

and himself the justice to say, that die, when he may, he will be regreted by all the inhabitants of every village in which he had occasion to reside. As for the gentlemen of rank in the different parts of the country where he lived, he was by birth their equal, by education not their inferior, by his behaviour not their disgrace; and he always kept their company, and received from them all the marks of friendship and esteem. He had licences to hunt upon their grounds, if he inclined, from most of them; particularly the Earl of Marchmont's commissioner the Earl of Loudon, Mr. Alexander of Boydstone, Doctor Hunter of Montfod, and many others, some of which licences he preserved, and they are produced: the rest can eafily be proved if necessary. The written licenses produced, not only allow him to hunt, but authorise him to preserve the game, and prosecute poachers. * These licences he used but some times, as the sport of hunting, however agreeable and suitable to him in his youth, he found, when keenly pur-

At Sornbey, this thirteenth of April 1752.

* I Hugh Campbell, factor to the Earl of Marchmont, as having full power and commission from the said Earl, not only to preserve the game, both by land and water, but also having full powers to grant commission to such as I shall think proper for the preservation of the same, within his Lordship's territories in this county, Do therefore, by virtue

purſued, was too fatiguing for a man of his years, and of his valetudinary ſtate of health, which, however, was benefited by the moderate uſe of ſport. Theſe licences ſhow with what juſtice the panel has been repreſented as a common fowler or poacher. He never ſold a bird in his life; the little game he killed, he was in uſe ſome times to ſend in preſents to his friends and acquaintance; for the moſt part he gave it to the firſt poor perſon he met with: but, as is already ſaid, he was not much addicted to that exerciſe. He ſpent his time in faithfully diſcharging the duty of his office, in reading, and in company with the gentlemen in the neighbourhood, or of ſuch as came to viſit the places in

tue of the above powers, grant full power and commiſſion to Mr. Mungo Campbell, officer of exciſe at Newmilns, not only to prevent all and ſundrie from ſpoiling the game either by land or water, where his Lordſhip has right; but alſo to proſecute ſuch before the ſheriff of the county, in his Lordſhip's name, and on his expence; but alſo grant the ſaid Mr. Campbell himſelf, full power, to take what diverſions he pleaſes for himſelf upon water or land; and this ſhall be ſufficient warrant for ſo doing.

HUGH CAMPBELL.

Theſe are impowering and authoriſing you, Mungo Campbell, officer of exciſe, to hunt upon my muir in Muirkirk, with dog and gun only; and to inform me of any poacher you ſhall ſee hunting upon ſaid muir; and this ſhall be your warrant. Given under my hand, at Loudon, 28th July 1764.

LOUDON.

which

which he reſided; for, however he may be now miſrepreſented, he was always the man a ſtranger was directed to ſpend the evening with, on account of his company and converſation.

The panel's laſt ſtation, as has been already obſerved, was at Saltcoats, the eaſieſt perhaps in Scotland. Something more than a year ago he was apprehenſive that he would be obliged to exchange ſtations with one Mr. Scott, by the intereſt of the collector of the diſtrict, who was deſirous of placing Mr. Scott a friend of his, who had formerly been a ſuperviſor, in the eaſy ſtation of Saltcoats. His powerful intereſt the panel imagined he could not oppoſe, without making a greater buſtle, and employing more ſolicitation with his numerous friends, than his natural temper inclined him to; he therefore reſolved to give up his office, and take a farm, ſuch as the ſmall ſum he had ſaved could ſtock, provided one of that extent could be had in, or on the confines of Ayrſhire. For this purpoſe, he wrote to his intimate friend the Rev. Mr. Andrew Roſs, ſometime miniſter at Newmills, now at Inch, near Stranraer, acquainting him, that he had ſaved about 100l. that he was deſirous of retiring to the country, and therefore intreating, that he would look out for a ſmall ſpot, ſuch as his ſcanty ſtock would be able to cultivate. This Mr. Roſs

would have done, and had the panel got a farm, the unhappy accident that gives riſe to this trial would not have happened; but unluckily, the panel's rival, Mr. Scott died, after which there was no mention made for removing the panel from Saltcoats; and there he remained till the fatal 24th of October.

The panel is very ſenſible, that the detail he has given will, at firſt ſight, to ſome appear trivial and impertinent; but a very little reflection will convince them it is not ſo; for the panel has been egregiouſly miſrepreſented as to all the particulars above-mentioned. Never almoſt againſt any man were the tongues of clamour and calumny ſo loud, ſo abuſive, and ſo falſe. The reaſon is indeed obvious, and on account of ſome circumſtances, the panel is ready to forgive them, but he would have been wanting to himſelf, conſidering how unjuſtly he has been traduced, if he had not ſet forth the true tenor of his life and converſation; for from that it is evident, he is not the obſcure gauger, the diſgraced ſoldier, the common poacher, or the fierce and ferocious ruffian which prejudice has repreſented him to be. On the contrary, he is, and he always was, a man of a peaceable diſpoſition, of much humanity, and ſenſibility of temper. The facts he has ſtated above are true. Thoſe in this country, who will give themſelves the trouble to enquire, will

will find them to be ſo. The panel is above telling what is not truth. To die in any way is a ſerious matter. To die in the manner with which he is threatened is dreadful; but the panel is not ſo much afraid of death, in any ſhape, as to be willing to purchaſe life at the expence of a lie deliberately and judicially told. When, therefore, the circumſtances in which he ſtands are conſidered, the ſimple annals of his life will be read by the juſt with attention, by the humane with feeling, nor ſhould grandeur itſelf peruſe them with diſdain.

In the courſe of the above narrative, the panel might have mentioned ſome occurrences, on which he had occaſion to meet the late Lord Eglinton; but he choſe rather to delay them, till he came to ſpeak of the 24th of October, though they have no immediate connection with what happened then. The panel, as already ſaid, though he had licences to hunt on the lands of ſeveral noblemen and gentlemen, yet he ſeldom took the benefit of them. This was particularly the caſe from the year 1765, before which he loſt his health, and was obliged, on ſundry occaſions, to go to the country to attempt the recovery of it. With this view, he in particular went to Muirkirk in 1764.—— Before he went there, he had a licence from Lord Loudon and ſeveral neighbouring gentle-

men to hunt upon their grounds, in that part of the country: But theſe he ſcarcely ever uſed; for at Muirkirk he broke his leg, by which accident he was long confined to the houſe. This determined him to ſell his pointer, and he has never had any dog ſince.

He came to Saltcoats in 1766. He had no dog when he came, nor has he ever had any ſince. He indeed kept his gun, and it was neceſſary for him to do ſo, as the ſmugglers in that part of the country, whoſe detection was his buſineſs and duty, always to go armed. With this gun he would ſometimes ſhoot ſparrows and other birds, at the deſire of the people whoſe corns they infeſted, and ſometimes (for his amuſement) gulls, as he paſt along the ſhore. But, with his gun, he gave no offence whatever for two years to Lord Eglinton, who was extremely ſtrict in the preſervation of the game on his eſtate. Nay ſo anxious was the panel to avoid even all poſſibility of offending his Lordſhip, that, when he publiſhed an advertiſement, prohibiting all perſons to fiſh on the water of Garnock, he complimented a gentleman * of his Lordſhip's acquaintance with a very curious and valuable fiſhing-rod that belonged to him. Thus for two years he gave not the leaſt offence to the late Lord, who, though he was every now-

* Mr. Leitch of Glaſgow.

and

and-then holding courts, and fining offenders, never once cenſured or even ſuſpected the panel. However, in ſpring laſt, he did tranſgreſs once, and he will fairly tell how that happened.

The panel ſet out that day in ſearch of ſmuggled goods, and had along with him Robert Cuninghame and William Bolton, ſhipmaſters in Saltcoats, witneſſes cited for the proſecutors, and in the courſe of their walk, ſhot two gulls.——On their return homewards by the King's high-way which runs near to Park-houſe, a farm belonging to the late Lord Eglinton, a hare ſtarted out of a buſh at the ſide of the highway, on which the panel and his companions were travelling: upon this the panel, partly from ſurpriſe, and partly poſſibly from the inſtigation of thoſe with him, took aim, and ſhot her. The report of the gun was heard by Lord Eglinton, who was then at park-houſe, and he immediately diſpatched a ſervant to inquire about it. The ſervant (whoſe name the panel has forgot) came up to the panel, who candidly told the fact as it had happened. That ſervant went back to his Lordſhip, and ſoon after another ſervant, one Alexander Bartley-more, returned to the panel, and told him, that his Lordſhip was in a great paſſion, and that the panel ſhould go and pacify him. Accordingly the panel went up to his Lordſhip,

ſhip, who accoſted him with many harſh and injurious expreſſions, accompanied with many oaths. To theſe the panel anſwered, that it had never been his intention to hurt his Lordſhip's ſport; told him the fact honeſtly as it had happened; and aſked his Lordſhip's pardon, aſſuring him, that he would take care never to offend again; and thus they parted. His Lordſhip did not at this time demand the panel's gun, nor does the panel believe he ever would have done ſo, had he not been inſtigated to uſe the panel ill by the above-mentioned Bartleymore, for a reaſon that will by and by be explained; for his Lordſhip knew who the panel was; knew that he was no poacher: knew that he was a gentlemen, and, as ſuch, had ſome intercourſe with him; particularly once did him the honour to take the uſe of a dog from him for ſome time.

What in all probability give riſe to the fatal accident, which occaſions this trial, was the enmity the above-mentioned Bartleymore conceived againſt the panel; the riſe of which was as follows.

On the 3d of July laſt, the panel had information, that ſome ſmuggled goods were to be landed near Caſtlecraigs, a noted haunt of the ſmugglers; upon which the panel, accompanied with John Brown, tide-waiter, and James Macdonald, ſalt-officer, ſet out early

early next morning in queſt of them. They found the above-mentioned Alexander Bartleymore (a favourite ſervant of the late Lord) driving a horſe and cart towards Park-houſe, loaded with ſome caſks containing 80 gallons rum; upon which they ſeized the rum; horſe and cart, and carried them to the exciſe-office at Irvine. But the horſe and cart, being ſuppoſed to be Lord Eglinton's, Bartleymore was allowed to take back; and they were not brought to condemnation along with the ſpirits.——From that moment Bartleymore became a declared enemy to the panel. Whether the late Lord heard of this ſeizure or not, the panel cannot ſay; far leſs does he mean to inſinuate, that his Lordſhip had any concern in the adventure; or, though he had, that the ſeizure of it would have irritated his Lordſhip againſt the panel, who did no more than his duty in laying hold of it: but the panel has no doubt, that this ſeizure made Bartleymore his deadly foe, and prompted him to inſtigate the late Lord his maſter to attack the panel, in the manner he did on the 24th of October laſt; to the account of which unhappy affair the panel muſt now proceed.

In the forenoon of that day, abuot ten o'clock, the above-mentioned Mr. Brown tide-waiter, and the panel, ſet out from Saltcoats;

coats; their view was principally to examine ſeveral places that are the known haunts of ſmugglers; at the ſame time they meant to do this in a way that might afford themſelves ſome amuſement; for which purpoſes they propoſed to walk from Saltcoats to Montfod bank, by a common road that led through Lord Eglinton's grounds, and return by another along the ſea-ſhore; on which the places noted for ſmuggling are ſituated. They had no dog with them, ſo it neither was nor could be their intention to hunt. Mr. Brown had not ſo much as a gun. The panel indeed carried his along with him, as he commonly did. He had, as already ſaid, a licence from Dr. Hunter, but he had no occaſion for it at this time, as all he propoſed was to look for a woodcock in Montfod bank, and the woodcock is not a bird of game; but as for hunting, he neither meant to take that ſport, nor could he do it, as he had no dog.

Mr. Brown, and the panel proceeded accordingly in their courſe, from Saltcoats to Montfod, which is about three miles diſtant from Saltcoats. The road they took paſſes thro' the grounds belonging to Lord Eglinton, Dr. Miller, and Mr. Weir of Kirkhall; ſome part of which road is incloſed on both ſides, ſome part of it only on one ſide, and ſome part of it is intirely open; and in this walk they

they met with no body but Alexander Boyes an officer of exciſe, who accompanied them ſo far in going round his diviſion, and to him they communicated their propoſed rout.

When arrived at Montfod, they ſearched the wood for a cock, but found none; upon which they went to the extremity of Montfod, which is high ground, in order to get a view of the Horſe-Iſland, under the cover of which ſmugglers were in uſe to ly: but perceiving there were none there, they returned by the foot of Montfod-burn, a common haunt of ſmugglers, and they croſſed, by a ſhort cut, a neck of marſhy ground not incloſed, near New-houſe, which to them was known to be a hiding-place for ſmuggled goods, and thus entered upon the ſands leading to Caſtlecraigs, the moſt remarkable place of all for ſmuggling.

After they had thus got into the ſands, and had walked along them a conſiderable way, the above-mentioned Bartleymore thought proper to inform the late Lord Eglinton, his maſter, that the panel had been hunting on his grounds, and this his Lordſhip it ſeems believed; for he immediately came out of his coach, in which he was paſſing on the road from Saltcoats to Largs; and, mounting a horſe, he rode, attended by ſeveral ſervants, towards the panel, who was

at that time, and for a conſiderable time before, 36 yards within the flood mark.

When his Lordſhip had come near to the panel, he diſmouuted, and gave the horſe to one of his ſervants, and then, damning the panel for a ſcoundrel and a raſcal, aſked how he came to be hunting upon his grounds, and required him inſtantly to give up his gun.

To this the panel anſwered, that he had not been hunting on his Lordſhip's grounds: nor had he ſhot any thing that day any where elſe; nor had he done any thing that deſerved his Lordſhip's diſpleaſure, which he was ſorry to ſee he had incurred; but that if his Lordſhip ſhould ſtill think that the panel had done any thing wrong, his Lordſhip might ſue him at law, to which he would be anſwerable: but as for giving up his gun, that he would not do to his Lordſhip, nor any man upon earth.

All this however did not ſatisfy his Lordſhip, who perſiſted in demanding the gun, and advanced upon the panel in order to take it from him by force; which his Lordſhip would have eaſily effectuated, if he had got hold either of it or the panel, as he was the younger and the ſtronger man.

The panel upon his ſtepping backwards, repeated his refuſal to give up his gun, which

was

was cocked, and held it by his ſide in a defenſive poſture, as an indication of his firm purpoſe to preſerve it; warning his Lordſhip, at the ſame time, in the ſtrongeſt manner, not to attempt to ſeize it.

Lord Eglinton upon this, perceiving that the panel was reſolute, and determined not to part with his gun but with his life, ordered one of his ſervants to go and fetch his gun, which had been left in the coach, ſaying at the ſame time to the panel, he would ſhow him he could ſhoot as well as he. The ſervant went off for his Lordſhip's gun accordingly. This ſo much alarmed Mr. Brown, the panel's companion, that he inſtantly retired to a conſiderable diſtance.

In the mean time his Lordſhip continued advancing, and the panel retiring, and reſting his gun in the defenſive poſture in which ſoldiers are taught to keep their muſkets when they retreat. Upon a meaſurement, it appears that the panel retired 120 yards from the place where Lord Eglinton firſt aſſaulted him.

Lord Eglinton's ſervant, who had been ſent for the gun, was by this time within two or three yards of his maſter, with the gun in his hand. At this moment, the panel, while retreating, ſtumbled againſt a ſtone, and was thrown with violence on his back. As the piece was cocked, while in the panel's hand,

the ſhock of the fall, or his efforts to recover himſelf, made it go off, and by its diſcharge Lord Eglinton, then ſo near as to be graſping at it, was mortally wounded.

As the piece was cocked in the panel's hand, it is phyſically impoſſible, but that the impulſe of the fall the panel received, or his efforts to recover himſelf, muſt have made it go off. The indictment charges the panel with firing it intentionally. Did the panel know it to be true, that an act of his will occaſioned the diſcharge of the piece, or concurred with the natural impulſe of the fall, or his exertion to riſe, he would admit it, be the conſequence what it would; but he cannot admit that to be a fact of which he has no conſciouſneſs or recollection.

The panel, who was in the utmoſt confuſion, had no time to go up to my Lord to enquire into his ſituation, and bewail the unhappy accident, which he moſt certainly would otherwiſe have done, for he was immediately attacked with the utmoſt violence and fury by his Lordſhip's ſervants: it was natural for them to do ſo, and the panel does not blame them for it. One of them deſperately cut and wounded him in the face, and as the other had the gun, the panel got hold of it, to prevent his uſing it againſt him, and endeavoured to wreſt it out of his hand,

hand, but that he was not able to do, as others fell upon him.

The ſervants, after giving the panel a number of cuts and blows, proceeded to tie the panel's hands behind his back with cords, which they pulled ſo hard that the blood was ready to ſpring from the tips of his fingers.

Lord Eglinton was then put into the coach, which went home, and one of the ſervants, on horſeback, drove the panel with a cudgel to Saltcoats, threatening inſtantly to knock him down if he made the ſmalleſt attempt to run off. The panel remonſtrated much againſt ſuch mal-treatment, and aſſured him he would go willingly along, and readily ſubmit himſelf to juſtice.

This ſervant, at Saltcoats, was joined by a number of poor people, dependents upon Lord Eglinton, who vied with one another in inſulting the panel. From Saltcoats he was carried to Irvine, before Mr. Hamilton, his hands tied behind his back, his face ſtreaming blood. Mr. Hamilton, who is the provoſt of that borough, committed him to the priſon there, where he met with the moſt barbarous treatment; was put in irons, and was refuſed, during his ſtay in it, even the neceſſaries of life. From Irvine he was tranſported to Ayr in a cart, which was the moſt ignominious method of conveyance that occurred:

curred: and at Ayr he was put in irons. From Ayr he was carried to Glaſgow, where the jailor, from compaſſion, allowed him irons lighter and leſs galling than thoſe he had been loaded with at Ayr; but for this ſtep a proteſt, it is ſaid, was taken againſt that jailor. From Glaſgow the panel was brought to Edinburgh, where his irons, unlawfully put on, were taken off; and there he was brought to trial, and hitherto has had, and he hopes all along will have, a fair and a patient hearing.

The indictment charged, 'That whereas 'by the law of God, and the laws of this and 'every other well governed realm, murder, 'or the felonioufly bereaving any of his 'Majeſty's ſubjects of their lives, is a moſt 'atrocious crime, and ſeverely puniſhable; 'yet true it is, and of verity, That you the 'ſaid *Mungo Campbell*, have preſumed to 'commit, and are guilty, actor, or art and 'part, of the ſaid crime: in ſo far as the de-'ceaſed *Alexander* Earl of *Eglinton* having, 'upon the 24th day of October, in this pre-'ſent year 1769, or upon one or other of the 'days of that month, or of the month of *Sep-'tember* preceding, or *November* following, 'gone out from his houſe of *Eglinton*, in the 'county of *Ayr*, in his coach, to look at 'ſome of his grounds; and being told by 'one of his ſervants, when upon the road from

' from Saltcoats to Southerman, within the
' pariſh of Ardroſſan and ſaid county of Ayr,
' that he obſerved two perſons, one of them
' with a gun, at a ſmall diſtance, upon his
' Lordſhip's ground of Ardroſſan: The ſaid
' deceaſed Earl (who, by an advertiſement in
' the newſpapers, had forbid all unqualified
' perſons to kill game within his eſtate) came
' out of his coach unarmed, and mounted a
' horſe which was led by his ſervant, and
' leaving in his coach an unloaded gun, he
' rode towards the two perſons, who, in the
' mean time, went off the Earl's ground of
' Ardroſſan into the adjacent ſands; and he
' having come near to the two perſons on the
' ſaid ſands, and diſcovering the one with the
' gun to be you, the ſaid *Mungo Campbell*,
' he accoſted you by ſaying' " *Mr. Campbell*,
" I did not expect to have found you ſo ſoon
" upon my grounds, after the promiſe you
" made me when I laſt catched you, when
" you had ſhot a hare:" And the Earl hav-
' ing thereupon deſired you to deliver your
' gun to him, you refuſed ſo to do: and,
' upon the Earl's approaching towards you,
' you cocked your gun, and preſented or
' pointed it at him: and upon the Earl's then
' ſaying, Sir, will you ſhoot me? you an-
' ſwered, that you would, if his Lordſhip
' did not keep off. To which the Earl re-
' plied, That if he had his gun he could

' ſhoot

' ſhoot pretty well too, or uſed words to that
' import; and deſired a ſervant to bring his
' gun from his coach, which was then at
' ſome diſtance; and the Earl having diſ-
' mounted and walked towards you, leading
' his horſe in his hand (without arms or of-
' fenſive weapons of any kind) you retired,
' or ſtept backwards, as he approached, and
' continued to point your gun at him, deſir-
' ing his Lordſhip again to keep off; or, by
' God, you would ſhoot him: and a ſervant
' near to the Earl having begged of you, for
' God's ſake, to deliver your gun, you again
' refuſed, ſaying, you had right to carry a
' gun: To which Lord Eglinton anſwered,
' that you might have a right to carry a gun,
' but not upon his eſtate, without his liberty;
' but you ſtill perſiſted in refuſing to deliver
' your gun: and by ſtriking your foot againſt
' a ſmall ſtone, having fallen upon your back
' when retiring, and keeping your gun
' pointed at Lord *Eglinton*, as above deſcrib-
' ed, the muzzle of the gun came thereby to
' be altered in the direction from Lord *Eg-*
' *linton*, and to be pointed near ſtraight up-
' wards; and Lord *Eglinton*, who was only
' diſtant from you two or three yards, having
' ſtopped, or ſtood ſtill, upon your falling,
' you, as ſoon as you could recover yourſelf,
' and, reſting upon your arm or elbow,
' aimed or pointed your gun to the ſaid

' *Alexander* Earl of *Eglinton*, and wickedly
' and felonioufly fired it at him, then ſtanding
' unarmed, ſmiling at your accidental fall;
' and by the ſhot he was wounded in the
' belly in a dreadful manner, the whole lead-
' ſhot in the gun having been thrown into his
' bowels, of which wound the ſaid *Alexander*
' Earl of Eglinton died that night about
' twelve o'clock. And you, the ſaid *Mungo*
' *Campbell*, after perpetrating ſo cruel, wicked,
' and barbarous a crime, did immediately run
' to one of Lord *Eglinton*'s ſervants who had
' brought his gun from his coach, and who
' was ſtanding at ſome diſtance, and endea-
' voured to wreſt the gun from him, but was
' prevented by the aſſiſtance of another ſer-
' vant; and when the two ſervants were en-
' gaged with you, defending the gun, and en-
' deavouring to ſecure you, the Earl, who was
' then ſitting on the ground, called to the
' ſervants to " Secure the man, for he had
" ſhot him; but not to uſe him ill;" or uſed
' words to that purpoſe and effect: and upon
' your being brought near to Lord *Eglinton*,
' he ſaid to yourſelf, " Campbell, I would
" not have ſhot you."

The court, after this indictment was read, obſerved, that there might be ſome doubt of their juriſdiction, as it appeared, from the indictment, that the facts charged had happened on the ſands; and the Lord Advocate being

aſked whether they had happened within flood-mark, his Lordſhip admitted that they had; upon which the court having demurred as to their juriſdiction, and expreſſed a doubt that the trial ſhould have been before the Admiral, the queſtion of the juriſdiction was argued at great length by the counſel on both ſides *; upon which the court ordered minutes of debate to be made up, and adjourned for ſome days.

Thereafter, of this date ‡, the court pronounced the following interlocutor, upon the queſtion of juriſdiction.

'The Lord Juſtice Clerk, and Lord Commiſſioners of Juſticiary, having conſidered 'the debate, *viva voce*, at their laſt ſederunt, 'and foregoing minutes, They find, that the 'court has juriſdiction to try this indictment, 'in the firſt inſtance, and therefore declare, 'that they will proceed accordingly.'

Upon this the indictment was again read over to the panel, who pleaded Not guilty; and then counſel were heard at great length for two days, upon the queſtion of the relevancy; after which, the court ordered informations, and, in obedience to that appointment, this one is ſubmitted on the part of the panel, who deſigns himſelf *late* exciſe officer in Saltcoats,

* Dec. 18. 1769. ‡ Dec. 22. 1769.

becauſe

becauſe he has been turned out of his office unheard and untried.

In ſtating the defence of the panel, it is neceſſary, in the firſt place, to analyſe this indictment, and call the attention of the court to a variety of facts therein acknowledged, or to ſpeak plainly, to the different injuries it admits the panel received from the deceaſed Lord.

And 1ſt, it will be obſerved, that the indictment admits ſeveral *verbal* injuries to have been received by the panel from the deceaſed; it indeed does not ſet forth the injurious appellations of ſcoundrel and raſcal, or the abuſive curſes and oaths, with which, as already ſaid, the panel was loaded: but yet it admits verbal injuries to have been given by the deceaſed; for it ſets forth, that the deceaſed charged the panel with hunting on his grounds, and hunting in breach of promiſe; as alſo, that the deceaſed demanded the panel's gun, which, it is notorious, is always underſtood to be a demand the moſt injurious and affronting.

2dly, The indictment admits, that from *verbal* injuries, Lord Eglinton proceeded to *real*, by advancing upon the panel, and endeavouring to take his gun by force; that is, transfer the property of it to himſelf from the panel violently.

3dly, The indictment admits, that the deceaſed threatened to ſhoot the panel, and ſent one of his ſervants to fetch his gun, which was hard by, for that purpoſe. His Lordſhip's expreſſion, 'that if he had a gun he 'could ſhoot pretty well too,' which the indictment admits, plainly imports ſo much, and the ſending for the gun can bear no other conſtruction, and leaves no room to doubt; and accordingly, that ſuch was his Lordſhip's intention the remaining ſervant underſtood, and was therefore alarmed for the panel, and called out to him, as the indictment ſets forth, 'for God's ſake to deliver up 'his gun.'

4thly, The deceaſed perſiſted in advancing upon and aſſaulting the panel, who retired as his Lordſhip came on.

5thly, The panel, while retiring, was thrown down upon his back; and it was then, and not till then, according to the indictment itſelf, that he fired the piece.

The next thing to be conſidered is the conduct of the panel on this occaſion.

It will be obſerved, 1ſt, That it is admitted in the indictment, that if the panel did fire this piece, he did it not till after he had given the deceaſed fair warning of his danger, both by words and actions.

2dly, That the panel retired from before his Lordſhip for a conſiderable time and ſpace.

3dly,

3dly, That if the panel did fire his piece, he did not do ſo till he could retire no more, till he was diſconcerted, agitated, and provoked by a fall, occaſioned by the unjuſtifiable aſſault of the deceaſed.

4thly, That the panel had no other weapon to defend him but his fowling-peice.

So ſtanding the fact, even according to the ſhewing of the indictment itſelf, the queſtion comes to be, Whether the homicide that is charged was murder, or culpable homicide, *i. e.* Manſlaughter, or homicide in ſelf-defence.

This is a great and important argument in every view. It is of the utmoſt conſequence to the parties, to this court, and to this country. It is of importance to the noble proſecutor, to avenge his brother's blood: it is of ſtill more importance to the panel, to avoid an ignominious death. But it is of greateſt importance of all to this court, and to this country: for, from the high rank of the deceaſed, and other circumſtances, this is a trial of much expectation. The eyes of this nation, of our neighbouring nation, and perhaps the eyes of many in foreign nations, are fixed on thoſe who are to decide it. Beſides, it is obvious, that the great rights of mankind are the object of judicial diſquiſition: ſo that in after times, future lawyers, and future judges, will reſort to the record of this

trial for inſtruction and example. Hence all the conſiderations that can touch men of honour conſpire to make thoſe, whoſe duty it is to form an opinion upon this caſe, not only to give the cloſeſt attention, but to examine themſelves thoroughly, and ſearch their hearts to the very bottom, to prevent from lurking there certain prejudices, to ſome of which, as men, and to others of which, as good men, they muſt be liable. The panel means, that they ſhould take ſpecial care to baniſh from their boſoms all prejudices, ariſing from reſpect to the high rank of the deceaſed, regard for his perſonal worth, and remembrance of his friendſhip paſt.

The firſt point to be diſcuſſed in this argument is, Whether Lord Eglinton had a right to take the panel's gun from him by force.

The counſel for the proſecutor, in their pleading, and in the information they lately exhibited, have not pretended that Lord Eglinton had any ſuch right by the common law; they endeavoured to ſupport it by a paſſage of one of the game-laws *.

But the panel is hopeful he will be able to ſhow, beyond all poſſibility of contradiction, that, by that ſtatute, game-law as it is, Lord

* Act 1707. C. 13.

Eglin-

Eglinton had no right to take the panel's gun from him by force.

The wiſdom and propriety of theſe game-laws has been all along doubted by the more ſober and ſenſible part of this nation. They are moſt certainly a reſtraint upon the natural liberties of mankind, and run counter to one of their original paſſions; for the paſſion of hunting is natural and original, as much as any other appetite; and the reaſon of implanting it evidently was, that it was intended men, in their natural ſtate, ſhould ſubſiſt by hunting and fiſhing: and in fact, in the uncivilized part of the globe, which is by far the greateſt, men do ſubſiſt in that way to this day, though the artificial life, which the perfection of ſociety has introduced among us, makes us ſeek ſubſiſtence in a very different manner: but ſtill the paſſion breaks out; and there are few, if any, who have not, at ſome period of their life felt its force.

Though this paſſion is undoubtedly natural and original, and conſequently though a very curſory reflection muſt have ſhown that it was not to be eradicated totally, however, like other natural paſſions, it might have been moderated and reſtrained; yet the total ſuppreſſion of it is the hard taſk which the game-laws of this country have raſhly undertaken, and that with very little temper or management; on the contrary, with ſo much heat

and

and ſeverity, that no diſintereſted perſon can read them without feeling his blood riſe with indignation at Scottiſh ariſtocracy, with whoſe haughty pen they have been evidently drawn.

As theſe game laws ſtand, were they to be ſtrictly put in execution, few gentlemen in this country would be entitled to ſhoot upon their own ground; for one of theſe laws * prohibits all perſons whatever from ſhooting, except noblemen and gentlemen, or the domeſtics of noblemen and gentlemen, who have L. 1000 of valued rent, which few gentlemen in this country poſſeſs: the conſequence of which law, if carried into execution, would be, that the proprietor of a ſmall farm, or even a gentleman of opulent eſtate in ſome parts of the country, muſt lay by his arms, and deny himſelf the ſport of hunting, however pleaſing, while, at the ſame time, he muſt behold with tameneſs and ſubmiſſion his fields traverſed and trampled by the footmen of a lord.

Such being the nature of game laws, and as they are clearly encroachments upon the common law, and reſtraints upon the natural rights of mankind, it is indiſputable that they ought to be moſt ſtrictly interpreted. The act 1707, is the only game-law upon which

* Act 1685, C. 26.

Lord

Lord Eglinton's attempt to take by force the panel's gun, can with any colour be juſtified; for the reaſon juſt now aſſigned, it ought to be moſt ſtrictly interpreted; but there is no neceſſity for reſorting to a ſtrict interpretation, as it is obvious from the ſcope of the act, and every clauſe and expreſſion in it, that it does not authorize a ſummary ſeizure, but only a forfeiture by legal proceſs.

This ſtatute is in theſe words; 'Our ſove-'reign Lady, with advice and conſent of par-'liament, does hereby ſtrictly prohibit and 'diſcharge, in all time coming, the killing of 'muir-fowls from the firſt of March till the '20th of June; and partridges from the firſt 'of March to the 20th of Auguſt, incluſive, 'under the penalty of 20 l. Scots *toties quoties*, 'the half whereof to be given to the diſcov-'erer, and the other half to be at the diſpo-'ſal of the judge *before whom the ſame ſhall be* 'cognoſced. And, for the better preventing 'the killing of theſe fowls, during the fore-'ſaid prohibited ſeaſons, her Majeſty, with 'advice foreſaid, does ſtrictly prohibit and 'diſcharge the ſelling, buying, or uſing of 'theſe fowls during the foreſaid ſeaſons, 'within any burgh, village, or private houſe 'within this kingdom, *under the penalty afore-'ſaid, to be applied as above.* As alſo, it is 'hereby diſcharged, that no *common fowler* 'ſhall preſume to hunt on any grounds with-

' out a ſubſcribed warrant from the proprie-
' tors of the ſaid grounds, under the penalty
' foreſaid, beſides forfeiting their guns,
' dogs, and nets, to the apprehenders or diſ-
' coverers. And it is hereby further provided,
' that no fowler, or any other perſon what-
' ſoever, ſhall come within any heritor's
' grounds, without leave aſked and given him
' by the heritor, with ſetting dogs, and nets
' for killing fowls by nets; and if any com-
' mon fowler ſhall be found in any place with
' guns or nets, having no licence from any
' nobleman or heritor, they ſhall be ſent
' abroad as recruits. As alſo, that no perſons
' whatſoever ſhall ſhoot hares under the fore-
' ſaid penalty. And, for the better execut-
' ing of this law, her Majeſty, with advice
' foreſaid, appoints and ordains all ſheriffs
' of ſhires, ſtewarts of ſtewartries, juſtices of
' peace, maſters of the game, bailies of burghs
' or regalities, to put the ſame in due execu-
' tion, under the penalty of 100 l. Scots;
' for which penalty, it is hereby declared,
' that the ſaid judges ſhall be liable to the
' purſuer or complainer before the Lords of
' Seſſion, upon an inſtrument taken by the
' ſaid purſuer or complainer, that the judge
' applied to refuſed or delayed to cognoſce
' the complaint according to law, and to
' *decern in the terms of this act.*'

It

It will be obſerved, that the firſt clauſe of this ſtatute expreſsly enacts, that the offence which it creates ſhould be tried before a judge, and puniſhed by a fine; and that all the ſubſequent clauſes refer to the ſame method of procedure. Thus the ſecond clauſe prohibits buying, ſelling, or uſing muir-fowl during a certain period, 'under the penalty 'foreſaid, to be applied *as above*:' And the third clauſe, which is the one in queſtion, diſcharges common fowlers to hunt, without a warrant, on any gentleman's grounds, 'under the *penalty foreſaid*, beſides forfeiting 'his dogs, guns, and nets to the apprehenders 'or diſcoverers;' from which it is plain, that the pecuniary penalty, and the forfeiture of the dogs, guns, and nets, are to be obtained in the ſame way; and as the act does not give (and it is impoſſible to believe that it meant to give) the apprehender a power of taking the penalty of 20 l. Scots out of the pocket of the perſon apprehended; ſo neither did it mean to give a power to the apprehender, of forcibly taking from the perſon apprehended his dogs, guns, and nets: beſides, it will be obſerved, that this clauſe puts the apprehenders and diſcoverers upon the ſame footing. And as it is clear, a diſcoverer, who has no hold of the perſon that has been ſhooting, cannot poſſibly make effectual, either the penalty, or the forfeiture of the dogs, guns, and

nets, otherways than by proceſs at law: ſo neither can the apprehender, who is put upon the ſame footing, and has not a more ſummary remedy given him. Moreover, the laſt clauſe of the act plainly ſuppoſes, that it was to be enforced only by judicial procedure, for it recommends the execution of the act to inferior judges, and inflicts penaltis upon ſuch as ſhall refuſe or delay to cognoſce the cauſes brought before them in conſequence of it, or to decern in terms of it, which evidently ſuppoſes that its different enactments were to be carried into execution by the decrees of judges, not the force of private perſons.

And the moſt abſurd and dangerous conſequences muſt enſue, were the interpretation in favour of a ſummary forfeiture to be liſtened to. It is adverſe to the firſt principles of law, to veſt the cogniſance of any offence in the perſon who is intitled to the penalty impoſed upon it; and it would have been peculiarly abſurd in this act to have done ſo, as it gives the penalty, *cuivis e populo*, to the greateſt vagabond or ſcoundrel in the country, as well as to the firſt perſon in it. Had the remedy been given to the proprietors of land, the preſumption might be, that they were perſons of character, and there might have been ſome reaſon for truſting them with an extraordinary power; but, as the remedy in this ſta-

tute

tute is given to *every* apprehender, and conſequently may be uſed by the moſt abandoned and profligate wretches, it is impoſſible to believe, that the wiſdom of the nation could ever mean to make them judges, and allow them to forfeit the dogs, guns, and nets of whatever perſon they thought proper.

It does not follow, from a man's being found ſhooting on the ground of another, that he is liable in the penalties and forfeitures above-mentioned. It has been always held to be game-law by the adepts in that ſcience, and it was ſo held by the late Lord Eglinton, as appears from ſeveral of his advertiſements in the news-papers, that 1000 l. of valued rent entitles a man to ſhoot not only upon his own grounds, but upon thoſe of every other perſon. If therefore a man is found ſhooting on another's grounds, it does not follow, that he is liable in penalties. If he has 1000 l. Scots of valued rent, or be the domeſtic of a perſon who has 1000 l. of valued rent, he is not challengeable: he muſt want all theſe qualifications, and be a common fowler, before he can be ſubjected in the penalties. Now how can the many different queſtions, that may ariſe as to his valuation or ſtation, be determined otherwiſe than before a judge? Is every vagabond and villain in Scotland to be entitled, at his own hand, to apprehend the dogs, guns, and nets of every man

man he meets, perhaps the firſt gentleman or nobleman in the country? The abſurdity of ſuch an interpretation is groſs and glaring; nor can it be ſuppoſed, that ſuch was the meaning of the act, without ſuppoſing, that thoſe who drew it were out of their ſenſes, or that it was their intention to ſet the ſubjects of this country by the ears, and incite them to batteries and bloodſhed.

It has been ſaid for the proſecutors, that the law would have been defective, unleſs it had allowed a ſummary ſeizure; becauſe common fowlers and poachers are commonly vagrants, who, if once allowed to eſcape, cannot be eaſily afterwards found out, and brought to juſtice.

But the law is abundantly ſevere, by allowing a forfeiture of the dogs, guns, and nets, even by proceſs, and by adjudging thoſe, called common fowlers, to be ſent abroad as recruits, if found huntingwithout licence: nor was there any great danger of their making their eſcape; for the gentlemen, enamoured of the game, are both able and willing enough to ſeek them out, if they are in the country. But, though the conſequence of not allowing a ſummary forfeiture were to be, that theſe fowlers ſhould always eſcape, that would have no weight in the argument. The queſtion is what the law has ſaid and enacted, not what it might have enacted in order to attain

the end it had in view: but from what has been ſaid, there can be no doubt, that thoſe who framed the law in queſtion, would rather have choſe that every common fowler ſhould eſcape, than that the power of forfeiting ſummarily ſhould be conferred on *every apprehender*.

The learned gentleman who draws the information for the proſecutors, aware of the abſurdities into which the interpretation he muſt maintain runs, repreſents, that the view or purport of the act, was to authorize a ſummary ſeizure of the dogs, guns, and nets, 'in order to lay the foundation for an after-'conviction in a court of juſtice,' in the ſame way that the officers of the revenue are permitted to make ſeizures of goods, the legality of which ſeizures may be afterwards tried at law. But there is not the leaſt foundation in the ſtatute for this hypotheſis. It does not authorize any ſeizure, which word is not to be found in it from beginning to end. If it allows the apprehender to do any thing at his own hand at all, it allows him to forfeit, and conſequently he is under no neceſſity to bring a proceſs in order to juſtify his detention of the dogs, guns, and nets. Indeed the uſing the word forfeiture of itſelf demonſtrates, that the act meant that legal proceſs ſhould be neceſſary; for a forfeiture can only be inflicted by the ſentence of a court. Beſides,

ſides, the allowing a ſeizure *brevi manu*, would be juſt as bad as allowing a forfeiture; for, as every perſon might ſeize, the dogs, guns, and nets of the beſt people might be taken from them by the moſt raſcally vagrants, whoſe vagabond life would ſecure them from detection and puniſhment: nor does any analogy hold from the ſeizures allowed by the revenue law, as theſe ſeizures are not permitted to *every* apprehender, but can only be made by public officers, who find ſecurity to be anſwerable, and who have an expreſs authority by the words of the ſtatutes to ſeize.

The panel has only further to add, that even though it ſhould be ſuppoſed that a ſummary forfeiture was allowed by the ſtatute, yet he was not comprehended under it, for it only reaches to common fowlers, that is to ſay, perſons who make a trade of killing and ſelling game, but that the panel never did; he, as has been already ſet forth, never ſold a bird in his life, and, inſtead of being looked upon as a common fowler, he, on the contrary, had licences to ſhoot for his amuſement from moſt of the noblemen and gentlemen in the neighbourhood, and was authorized by them to preſerve the game on their eſtates, and proſecute poachers; all which Lord Eglinton very well knew.

From

From what has been above ſubmitted, it is hoped it will appear, that both the words and ſpirit of the law, and every conſideration of reaſon and expediency, conclude ſtrongly againſt the interpretation contended for by the proſecutor; and this the panel takes the liberty to aſſert with the greater confidence, that a judgment in point was pronounced a good many years ago, by the Court of Seſſion, in the caſe Gregory againſt Wemyſs, which was determined 23d January, 1753, and is thus obſerved in the Faculty Collection for that year: 'As Mr. Gregory, attended by 'one Baird, was beating about for game on 'the lands of Leuchars, Mr. Wemyſs, a 'neighbouring heritor, came up and ſeized 'the fowling-piece which Baird carried. 'Gregory inſiſted, before the ſheriff-depute 'for the county of Fife, that the fowling-'piece, as being his property, ſhould be 'reſtored to him. The ſheriff found, that 'it was unwarrantable in Wemyſs to ſeize 'the gun libelled and therefore found him 'liable in reſtitution of it, in as good caſe as 'when he took it.

'Wemyſs advocated the cauſe, and pleaded 'that Baird was a common fowler, and had 'no licence to ſhoot from the proprietor of 'the lands of Leuchars; and therefore that 'he was within the 13th act of parliament, '1. of Q. Anne, which provides, That no

Gregory's deſignation, that he was profeſſor of mathematics at St. Andrews; but he does not pretend that he had an inch of ground, much leſs that he had ſo great an eſtate as qualifies its proprietor for killing game on the lands of another. Had he been ſo qualified, it is impoſſible to believe, but that his counſel would have ſet forth a circumſtance ſo material and deciſive.

From what has been above argued, it is, with ſubmiſſion, evident, that though the panel had been a common fowler, and hunting upon the 24th of October on Lord Eglinton's ground, his Lordſhip had not, in virtue of the ſtatute, any title to take his gun from him by force. But the injuſtice of his Lordſhip's demand is, if poſſible, made clearer by this circumſtance, which is not contraverted; viz. That the panel had not been hunting on his Lordſhip's ground. No ſuch thing is charged in the indictment, nor has any ſuch thing been alledged by the counſel for the proſecutor, in their pleadings, or in the information. All the indictment alledges is, that a ſervant told Lord Eglinton, that he ſaw two perſons, one of them with a gun, at a ſmall diſtance, upon his Lordſhip's grounds at Ardroſſan. But it does not ſay, that the panel had been actually hunting there that day. Now where is the law that ſays, a man muſt not paſs with a gun on his ſhoulder

ſhoulder along the highway, that runs thro' the grounds of another or through any grounds?

From what has been above ſtated, the panel flatters himſelf, he has made out to the ſatisfaction and conviction of every reader, that in point of law, Lord Eglinton had no right to take his gun. What the conſequences of that poſition muſt be, will appear by and by.

The panel's defences (though branched out into a variety of topics in the information for the proſecutors) come all under two heads, in ſo far as applicable to the relevancy of the indictment as laid, which the defence of mere accident is not; and they were ſo arranged at the pleading, and fall to be ſo in this information. He is to maintain, in the firſt place, that, ſuppoſing him to have committed intentionally a homicide upon Lord Eglinton, that, in the worſt view of the caſe for the panel, ſhould only be reckoned culpable homicide, the puniſhment of which is arbitrary, not murder; becauſe it appears, from the ſhowing of the indictment itſelf, it was not committed from premeditated malice, no ſuch thing being charged, but upon a ſudden quarrel, of which the panel was not the beginner or author, in the heat of blood and of paſſion, and upon great provocation by injuries both verbal and real, actually done him.

But,

But, 2dly, The panel is to maintain, That the homicide, as charged, was juſtifiable, or at leaſt excuſable, being committed in lawful defence of property, honour, and life, and to prevent the loſs of them all.

1ſt, Then, in the worſt view of the caſe for the panel, the homicide was but culpable, and only arbitrarily, if at all, puniſhable, becauſe of the provocation he had received. This is a queſtion of very great moment; and for the ſolution of it we muſt reſort to firſt principles and the conſtitution of human nature.

All animals reſent an injury or attack upon them. This they do not in conſequence of reflection, or any act of the underſtanding, but involuntarily and mechanically, by an impulſe from nature, wiſely implanted in them for the preſervation of the ſeveral ſpecies. The emotions of anger and reſentment are ſudden, involuntary, and mechanical, as is evident from the effect they produce upon the nerves, limbs, and features of all animals, who are affected with them. Matter is not more ſubject to the laws of gravitation, elaſticity, and the like, than the ſpirits of man, and of all animals, are ſubject to the impulſe of anger and reſentment. * Theſe, indeed, are laws of nature in the proper ſenſe,

* L. 1. § 3. ff. De juſtitia et jure.

being

being *quod natura omnia animalis docuit*; and therefore every animal, when attacked, reſorts to thoſe inſtruments of defence with which nature has ſupplied it.

† *Imperat hoc natura potens——*
Dente lupus, cornu taurus petit unde, niſi intus
Monſtratum——————

Mankind, as well as the inferior animals, are liable to the involuntary and mechanical emotions of reſentment. Every man who injures another feels this. He knows and feels, that in every perſon whom he attacks, he muſt excite theſe mechanical and involuntary emotions; and therefore, if he is hurt, or ſlain by the perſon attacked, he has himſelf only to blame, and is not improperly ſaid by lawyers to have killed himſelf. * *Interfectus ab invaſo, ſe defendente, videtur magis a ſeipſo occiſus, quam ab inſultato.*

As theſe emotions are mechanical and involuntary, and therefore cannot be prevented, it would be abſurd and unjuſt in any legiſlature to puniſh a man for being ſubject to them, or acting in the way and manner their impulſe directs: a legiſlature ſo puniſhing would fly in the face of nature, and arraign its Author. Accordingly no legiſlature under the

† Hor. lib. 2. Sat. 1. & 51. * Carp. p. 1. Q. 29. n. 28.

heavens

heavens ever thought of inflicting ſuch puniſhment; but the lawyers of all countries have in one voice agreed, that a diſtinction ſhould be made between ſlaughter committed from premeditation, and ſlaughter committed on a ſudden quarrel and provocation. The firſt they have moſt juſtly puniſhed with death: the laſt they either excuſe altogether, or give it the check of an arbitrary puniſhment; not ſo much from a principle of juſtice, as from the wiſe purpoſe of inſpiring an averſion and abhorrence of bloodſhed.——Hence moſt of them have not directly acquitted the ſlayer, but rather opened a way for him to effectuate his ſafety, by giving him the privilege of ſanctuary, or ſome other ſuch indirect method of relief. And for the ſame reaſon, though thoſe who ſlay men in their own defence, are indiſputably juſtifiable; yet the laws of many ancient nations obliged them to undergo certain ceremonies and purifications: and upon the ſame principle, in ſome countries, brute animals, and even inanimate ſubſtances that have occaſioned the death of a man, are forfeited and applied to pious uſes, as is the caſe of *Deodands* in England.

However, the law of all nations upon this queſtion reſolves into a diſtinction between ſlaughter committed from deſign and premeditation, and ſlaughter committed from a ſudden

a ſudden quarrel and provocation. The firſt is moſt juſtly puniſhed with death; becauſe it does not proceed from a mechanical or involuntary impulſe or emotion, but a deliberate act of the will and underſtanding, and therefore manifeſts a depravity of heart, a temper inconſiſtent with the rights and intereſts of ſociety. But the laſt ſpecies of homicide is either altogether excuſed, or only arbitrarily puniſhed; becauſe it does proceed from a mechanical or involuntary impulſe or emotion; conſequently it cannot be aſcribed to any bad motive; and it is the motive alone that makes an action criminal or virtuous, the object of reward or puniſhment, and conſequently of law. *Voluntas non exitus ſpectanda eſt*; that is to ſay, an action unaccompanied with a motive is nothing more than the operation of a piece of matter. And hence it is, that inanimate ſubſtances, brute creatures, and even human, who have not attained to reaſon by non-age, or have been deprived of it by diſeaſe, are not to be called to account for the ſlaughter of a man, which they may occaſion, but cannot commit.

It is however, no doubt, moſt juſt and and reaſonable, and is eſtabliſhed by the laws of this and every other country, that in order to conſtitute murder, a long antecedent deſign or premeditation is not requiſite. It is ſufficient, in order to found a capital puniſh-

ment, that a deſign or premeditation appear; and wherever an interval of time has elapſed between the provocation given and the ſlaughter enſuing, ſufficient to have given the perſon offended an opportunity to cool and reflect, the ſlaughter will then be murder: for if any conſiderable ſpace of time has intervened, the ſlaughter did not proceed from any mechanical, involuntary impulſe or emotion, but from a deliberate act of the will and underſtanding.

But if a ſufficient time for cooling did not intervene, the ſlaughter will not be murder, and ought not to be ſo. It is evidently accidental or *caſual*; for the meeting of the parties was caſual; their quarrel was caſual; and even the blow or wound that occaſioned the death was caſual; becauſe it did not proceed from deliberation, but an involuntary mechanical impulſe.

The principles above explained are obviouſly ſolid and ſound; they are principles which temper juſtice with mercy, and therefore they have been adopted into the law of every nation under the ſun.

The law dictated to the Jews by the higheſt authority is clear and explicit upon this diſtinction: it could not indeed be otherwiſe, as it came from the Author of nature, who, it would be impious to ſuppoſe, would frame laws on any other plan, would frame laws

which

which muſt have proved ſnares to mankind, by reaſon of the frailties which he has thought proper to give them. Such a ſuppoſition runs counter both to the words and ſpirit of the whole ſacred writings, which all along declare that he does not lay righteouſneſs to the line, or judgment to the plummet; that he will always remember men *are fleſh*. And accordingly, after conſidering the ſyſtem of the judicial law of Moſes, it will appear, that theſe gracious principles run through every part of it, and ſhine no where more conſpicuous than on the ſubject of homicide.

The general rule laid down is, 'Thou 'ſhalt not kill:' but then this general rule is explained, and limited by a variety of exceptions and reſtrictions, that bring the doctrine of the Jewiſh law preciſely to the diſtinction above-mentioned. That diſtinction is thus laid down in general*: 'If a man 'lie not in wait, but God deliver him into 'his hand, then I will appoint thee a place 'whither he ſhall flee. But if a man come 'preſumptuouſly upon his neighbour to ſlay 'him *with guile*, thou ſhalt take him from 'mine altar that he may die.' By this text it is evident, that he only who had committed a ſlaughter deliberately, or with guile, was to be taken from the altar that he might die;

* Exod. xxi. 13, 14.

but the man who had not ſlain his neighbour from premeditation, but had caſually ſlain him on a ſuddenty, was to have protection in a city of refuge.

This is put out of all doubt by two other paſſages of the Pentateuch, which are explained and illuſtrated with much learning and good ſenſe in the celebrated information for Mr. Carnegie of Finhaven *. Theſe paſſages ſhall be tranſcribed, and then the ſubſtance of the above-mentioned expoſition given.

The firſt of theſe is as follows; 'And this 'is the caſe of the ſlayer which ſhall flee 'thither, that he may live. Whoſo killeth 'his neighbour *ignorantly* whom he *hated not* '*in time paſt*; as when a man goeth into the 'wood with his neighbour to hew wood, and 'his hand fetcheth a ſtroke with the axe, to 'cut down the tree, and the head ſlippeth 'from the helve, and lighteth upon his 'neighbour that he die, he ſhall flee unto 'one of thoſe cities and live. Leſt the 'avenger of the blood purſue the ſlayer while 'his heart is hot and overtake him, becauſe 'the way is long, and ſlay him; whereas he 'was not worthy of death, inaſmuch as he 'hated him not in time paſt.'

* See Finhaven's trial from p. 42. to p. 82. incluſive. Deut. xix. 4, 5, 6.

The

The other, after ordering cities of refuge to be appointed, proceeds thus*: 'Theſe ſix 'cities ſhall be a refuge both for the children 'of Iſrael, and for the ſtranger, and for the 'ſojourner among them, that every one that 'killeth any perſon *unawares* may flee thi-'ther. And, if he ſmite him with an in-'ſtrument of iron (ſo that he die) he is a 'murderer. The murderer ſhall ſurely be 'put to death. Or, if he ſmite him with an 'hand-weapon of wood (wherewith he may 'die) and he die, he is a murderer. The 'murderer ſhall ſurely be put to death. The 'revenger of blood himſelf ſhall ſlay the 'murderer. When he meeteth him he ſhall 'ſlay him. *But*, if he thruſt him of hatred, 'or hurl at him by lying of wait, that he die; 'or in enmity ſmite him with his hand that 'he die, he that ſmote him ſhall ſurely be 'put to death, for he is a murderer. The 'revenger of blood ſhall ſlay the murderer 'when he meeteth him. *But*, if he *thruſt 'him ſuddenly without enmity*, or have caſt 'upon him any thing without lying of 'wait, or with any ſtone wherewith a man 'may die, ſeeing him not, and caſt it upon 'him, that he die,' and was not his enemy, 'neither ſought his harm; then the congre-'gation ſhall deliver the ſlayer out of the

* Numb. xxxv. from verſe 15. to verſe 28. incluſive.

'hand of the revenger of blood, and the congregation ſhall reſtore him to the city of his refuge, whither he was fled; and he ſhall abide in it unto the death of the high prieſt, which was anointed with the holy oil. But, if the ſlayer ſhall at any time come without the border of the city of his refuge, whither he was fled, and the revenger of blood find him without the borders of the city of his refuge, and the revenger of blood *kill the ſlayer, he ſhall not be guilty of blood*; becauſe he ſhould have remained in the city of his refuge until the death of the high prieſt; but, after the death of the high prieſt, the ſlayer ſhall return into the land of his poſſeſſion.'

It will be obſerved, that, in the firſt verſe of the firſt paſſage, that the word *ignorantly* is explained by the ſubſequent expreſſion, *whom he hated not in time paſt*; from which it is evident, that the word *ignorantly* does not import, that the ſlayer knew not that he killed his neighbour, but that he killed him without a foreknowledge, a foreſight, a former ratiocination and deſign; for it is obvious, that, if a man killed his neighbour ignorantly, *i. e.* not knowing that he killed him, it would not be murder, even though he had hated him before; becauſe it would be palpably unjuſt to conjoin even a previous enmity with a killing purely and perfectly accidental, in order

der to nake it amount to murder. The matter is fully explained in verſe 11, which text does not ſay, that, if a man ſmite his neighbour whom he knew, although without hatred, and without lying in wait, and without riſing up againſt him, that he ſhall ſurely die; by no means: on the contrary, it puts the iſſue of his dying or not upon his hating, riſing up againſt, or lying in wait for him that he did kill, that is, upon his deſigning to take his opportunity from premeditated malice.

Nor is it any objection, that the examples given in verſe 5th are of ſlaughter perfectly and ſtrictly caſual. Theſe examples do not exhauſt the rule, as is fully proved by verſe 11, for it does not extend the capital puniſhment to all who came not under the deſcription in verſe 5th, but extends it to thoſe only who *hated their neighbour, lay in wait for him, and roſe up againſt him.* The above is indiſputably the ſound interpretation of the firſt paſſage, though the matter is ſtill more fully explained in the other paſſage from the book of Numbers, where the general rule laid down is, that every one may fly to the cities of refuge, that kills any perſon *unawares.* Now nothing can be plainer, than that killing unawares, means killing without deliberation, without forethought, *ex improviſo, ex inconſulto.*

After

After laying down the above general rule, the text proceeds to an inlargement or amplification of it. 'And if he ſmite him with 'an inſtrument of iron, &c.'—Theſe are the amplifications; the limitations follow in verſe 20. '*But if he thruſt him of hatred*,' &c. Here is the limitation (introduced with the particle *but*) he that killeth or thruſteth with an iron weapon is a murderer, qualified with the reſtriction, but if he thruſt him of hatred; that is, in other words, he is a murderer if he thruſt him with hatred: and this is ſtill more clearly ſet forth in v. 22, *et ſeq.* where thruſting ſuddenly is ſet in oppoſition to thruſting with enmity, with a direct reference to the 16, 17, and 18th verſes. In verſe 22, *et ſeq.* all the three methods of killing, mentioned in verſes 16, 17, and 18, are referred to. Thruſting (properly applicable to the killing with a ſword) caſting any thing upon him, without lying in wait, or forethought, *or with any ſtone, wherewith a man may die*, the very caſe put in verſe 17, and there deemed to be murder; yet, in this verſe 23, it is declared not to be murder, and, that the ſlayer ſhall be delivered from the avenger of blood, if he was not his enemy, neither ſought his harm; ſo that it is clear as ſunſhine, the three laſt verſes contain a limitation of all that went before. By verſes 16 and 17, the inſtrument, of whatever nature, was to raiſe a preſumption

tion, if a mortal one: but, by verſes 22 and 23, if it ſhould appear, that the perſon ſlain was not thruſt, hurled at, or ſmitten *in enmity*, &c. the ſlayer was not to be found guilty of murder, but to be delivered from the avenger of blood.

Nor can any objections be drawn from the words, *ſeeing him not*, which occur in verſe 22, as if it was requiſite for the ſlayer's ſafety, that he did not ſee him that was thruſt at or killed with a ſtone, though not done in enmity. For, *firſt*, It will be obſerved, that the word *him* is not in the original, but has been added by the tranſlators, and is accordingly diſtinguiſhed as ſuch with Italic letters in all correct editions of the Bible. This addition of the word *him* is evidently erroneous: the expreſſion ſhould have been *ſeeing not*; nor ſhould the tranſlators have made uſe of our participle *ſeeing*, but, according to the idiom of the Latin language, of an adjective, ſuch as *improvidus*, *imprudens*, or the like: and accordingly the Septuagint uſes a Greek adjective of that ſignification. But, *2dly*, The words *ſeeing him not*, however they may refer to the caſe of throwing a ſtone, yet they can not poſſibly refer to the words *thruſting without enmity:* for how can a man, in any proper ſenſe, be ſaid to thruſt at another whom he ſeeth not? In ſhort, the ſenſe comes clearly out to be, that when a thruſt or blow was given without enmity, forethought, or premeditation, the

ſlayer was not to be found guilty of murder, but to have the benefit of the city of refuge; and ſo all the Jewiſh lawyers and doctors have uniformly held.

The above learned, judicious, and convincing explanations are taken from the information for Carnegie of Finhaven; and any perſon who will attentively conſider them with the Bible before him, will eaſily perceive the fallacy of the arguments offered in the information for the proſecutors in this caſe, which are the ſame with thoſe urged in the information for Mr. Carnegie's proſecutors, to prove that only homicide, ſtrictly caſual, was exempted from capital puniſhment by the law of Moſes.

The panel ſhall conclude on this head with ſubmitting an additional obſervation or two in confirmation of the doctrine on this point maintained for Finhaven: The firſt is, that it is not to be ſuppoſed, that the law delivered to Moſes would have been at ſo much pains to explain and declare in ſo many different paſſages, by a variety of illuſtrations and examples, that homicide, altogether accidental or caſual, was not puniſhable with death, for that is a propoſition perfectly clear and indiſputable. It is only homicide ariſing from provocation that gives riſe to queſtions of any difficulty. 2*dly*, The panel would obſerve, that it is proved clearly by the cloſe of the

paſſage

paſſage above quoted from the book of Numbers, that provocation was ſufficient to juſtify, at leaſt excuſe homicide. It is expreſsly laid down in verſe 27th, That if the revenger of blood, ſhall find the ſlayer without the borders of the city of refuge, and kill him, he ſhall not be guilty of blood, which evinces, that the occaſioning the death of his kinſman, though by accident, was provocation ſufficient to juſtify or excuſe the revenger of blood for putting the ſlayer to death, not only immediately after the ſlaughter, while his *heart was hot* (as expreſſed in verſe 6th of the firſt paſſage), but *ex intervallo*, and at a very great diſtance of time. The panel is at a loſs to comprehend how the proſecutors will reconcile this with their doctrine, that no homicide, except that ſtrictly caſual, was exempted from capital puniſhment by the law of Moſes. *Laſtly*, The panel would obſerve, that the lateſt and moſt judicious divines, who have written upon the law of Moſes, agree in thinking its doctrine ſtands as the panel has repreſented. The panel ſhall only tranſcribe a paſſage from the late excellent book, intitled, " A critical and practi-
" cal expoſition of the Pentateuch. *" ' *But if*
' *he thruſt him ſuddenly without enmity*, &c.
' But if, on the contrary, the miſchief ap-
' pears to have been done in a *ſudden fit of*

* Printed in folio, 1748.

'*paſſion or provocation unpremeditated, without*
'*any foregoing threat, grudges, or malicious in-*
'*tention*, then the Court, before whom the
'caſe is tried, is to pronounce it mere *man-*
'*ſlaughter*, and acquit the ſlayer from all pri-
'vate revenge from the friends and relations
'of the perſon ſo ſlain.' See Pyle†.

As to the civil law, it likewiſe adopts the ſame diſtinction. 'Quamvis ferro percuſſe-
'rit, tamen non occidendi animo, leniendam
'pœnam ejus qui in rixa caſu, magis quam
'voluntate homicidium commiſit.' It is evident, that the *animus occidendi* here meant, is a premeditated *animus* or intention, and not that the law is talking of a blow or wound given by pure accident; for ſuch a poſition is excluded by the *ſpecies facti*, which is the ſubject of conſideration, according to which the parties were in a quarrel or *rixa*. And to the ſame purpoſe, a text in the Code *, Si pro-
'baverit, non occidendi animo hominem a ſe
'percuſſum eſſe, remiſſa homicidii pœna ſe-
'cundum diſciplinam militarem ſententiam
'procuret, crimen enim contrahitur, ſi et
'voluntas nocendi intercedit, cæterum eo qui
'ex *improviſo caſu*, potius quam *fraude*, acci-
'dunt, *fato* plerumque, non *noxæ* imputan-
'tur.'——The *voluntas nocendi* here meant is a premeditated *voluntas*, which is evident from the expreſſion *caſu potius quam fraude*.

† L. 1. Par. 3. ff. ad leg. Car. de ſic. * L. 1. Cod. ibid.

And

And that according to the notions of the Roman lawyers, provocation, juſtified and excuſed, appears from the following deciſion, in a queſtion as to the *actio noxalis*, which lay for damage done by a brute animal *contra naturam ſui generis*. 'Cum arietes, vel boves 'commiſiſſent, et alter alterum occidit, Quin-'tus Multius diſtinxit, ut ſi quidem is periſ-'ſet qui *agreſſus erat*, ceſſaret actio; ſi is qui 'non PROVOCAVERAT, competeret actio.' Which determination is founded upon the great principle above explained, that the impulſes of reſentment and ſelf-defence are implanted in all animals, and that their emotions are involuntary and mechanical.

As to the commentators and doctors of the civil law, they all adopt the diſtinction betwixt ſlaughter committed from premeditated malice, and ſlaughter on a ſudden provocation, they hold that an attack and provocation make a man to be not in *plenitudine intellectus*. This is expreſly laid down by Carpzovius in theſe words*: 'Sane difficillimum juſtum do-'lorem et iracundiam temperare, cum homo 'intenſo dolore permotus, non ſit in plenitu-'dine intellectus:' then he proceeds to diſtinguiſh very properly between a juſt and unjuſt cauſe of taking offence, and admits the former to be ſufficient to excuſe. 'Si ergo

* Part 1. Q. 6. n. 6, 16.

'juſta

'juſta cauſa calorem iracundiæ præcedat, ve-
'luti ſi quis ab alio fuerat provocatus, aut
'alio modo offenſus, tunc is qui ira aut in-
'tenſo dolore permotus provocantem ſeu
'offendentem interfecit, abſque dubio a pœna
'ordinaria liberabitur.' Yet Carpzovius is well known to be the ſevereſt criminaliſt that ever put pen to paper; and it is therefore needleſs to quote more authorities upon that point.

The panel comes now to the law of England; the doctrine of which, with regard to homicide, he is adviſed, is the very perfection of human reaſon. That law proceeds in this matter upon the principle that *ira furor brevis eſt*; and therefore it holds, that homicide committed while the *furor brevis* occaſioned by provocation continues, is excuſeable homicide, or manſlaughter, not murder; but if committed *ex intervallo*, after the blood has had time to cool, it is murder. So the law of England is laid down by Judge Foſter *, who is quoted by the proſecutors themſelves. 'I 'now proceed, he ſays, to that ſpecies of fe-
'lonious homicide which we call manſlaugh-
'ter; which, as I have before obſerved, the
'benignity of our law, as it ſtandeth at pre-
'ſent, imputeth to human infirmity; which,
'though, in the eye of the law, criminal, yet

* Crown Law, diſ. 2. ch. 5.

'is

'is conſidered as incident to the frailty of the 'human frame.'—'The caſes falling under 'the head of manſlaughter, which moſt fre- 'quently occur, are thoſe where death en- 'ſueth upon a ſudden affray, and in heat of 'blood, upon ſome provocation given or con- 'ceived.'——'What degree of provocation, 'and under what circumſtances, heat of 'blood, the *furor brevis*, will or will not 'avail the defendant, is now to be conſidered.' Then he proceeds to ſtate a variety of caſes, which ſhall by and by be taken notice of; and then he adds, 'But in theſe, and indeed in 'every other caſe of homicide upon provo- 'cation, how great ſoever it be, if there is 'ſufficient time for paſſion to ſubſide, and 'for reaſon to interpoſe, ſuch homicide will 'be murder: A. finds a man in the act of 'adultery with his wife, and in the firſt 'tranſport of paſſion kills; this is no more 'than manſlaughter; but had he killed the 'adulterer deliberately, and upon revenge, '*after the fact, and ſufficient cooling time*, it 'had been undoubtedly murder; for let it 'be obſerved, that in all poſſible caſes, de- 'liberate homicide, upon a principle of re- 'venge, is murder. No man, under the pro- 'tection of the law, is to be the avenger 'of his own wrongs.' This laſt ſentence the proſecutors quote, but they prudently leave out all that went before. Numberleſs

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authorities might be accumulated upon the ſame point, but it would be ſuperfluous, as it is notorious that ſuch is the law of England. But though the panel will quote no more authors, yet he will beg leave to tranſcribe a paſſage from a pleading of the ſolicitor-general of England, in a late very remarkable caſe; as that pleading demonſtrates, that the above diſtinction is not confined to books, or only adopted by contemplative lawyers, but that it is univerſally admitted in practice, and in caſes of the greateſt importance and expectation. In ſumming up the evidence againſt Lord Byron, Mr. Solicitor General began as follows *: 'The noble priſoner at the bar is charged with having killed Mr. Chaworth deliberately and maliciouſly, and, in the terms of the indictment, with malice aforethought. That he killed him is a truth beyond diſpute; and he who takes away the life of another, is preſumed to have taken it away deliberately and maliciouſly, till it ſhall appear to have been the effect of neceſſity, of accident, or of *ſudden paſſion*; for as neceſſity will juſtify, and accident excuſe the fact, an *ungovernable tranſport of paſſion* will ſo far alleviate the crime, as to make that which would otherways have been murder and a capital offence,

* Lord Byron's trial. p. 37.

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'manſlaughter only, which ſaves the life of 'the offender. This is a condeſcenſion the 'law ſhews to the frailties of the human 'mind, which, upon great and ſudden occa-'ſions, cannot command itſelf, or maintain 'its reaſon.'

The panel, in the laſt place, comes now to conſider the law of Scotland, which he hopes, both for his own ſake, and that of his country, will be found to be not ſingularly abſurd and unmerciful, but that it adopts the ſame juſt and humane diſtinction. Slaughter of aforethought felony was anciently, as well as now, capital by the law of this country; but ſlaughter on a ſudden quarrel and provocation was not capital; it was called *chaude melle*, and the ſlayer had relief by the privilege of girth and ſanctuary; in the ſame way as the ſlayer had relief by the privilege of the city of refuge among the Jews, and as he has by the benefit of clergy among the Engliſh. It is of no conſequence in what form a man is freed of puniſhment, if he be freed.

The counſel for the proſecutors, in their information, is pleaſed to deny, that *chaude melle* was not capital by our old law; and in ſupport of this poſition adduces ſome of the arguments urged in the above-mentioned information for Mr. Carnegie's proſecutors, which are founded chiefly on miſconſtructions of ſome parts of our old law; at the ſam

time he ſays, it is a matter of no great conſequence, whether it was ſo or not; becauſe he ſays, and truly, that the act 1661 muſt regulate the matter. All the arguments uſed to prove that *chaude melle* was capital by our old law, are fully and moſt ſatisfactorily confuted in the * above-mentioned information for Mr. Carnegie; to which the panel begs leave ſo far to refer, contenting himſelf with ingroſſing the different old ſtatutes we have upon that ſubject *verbatim*, and in their order.

James I. parl. 3. act 51. intituled, of forethought felony and *chaude melle* ſtatutes, 'That as ſoon as any complaint is made to 'juſtices, ſheriffs, bailies, &c. they ſhall inquire diligently, *i. e.* without ony favour, 'gif the deed was done upon forethought 'felony, or throw ſudden *chaude melle*, and *gif* '*it be found forethought felony*, the life and 'goods of the treſpaſſer to be in the King's 'will: and gif the treſpaſs be done of ſudden '*chaude melle*, the party ſkaithed ſhall follow, 'and the party tranſgreſſor defend after the 'courſe of the old laws of the realm.'

James I. parl. 6. act 89. intituled, 'The 'Manſlayer ſuld be purſued, until he be put 'forth of the realm, or brought again to the 'place of the ſlauchter.' (The act appoint-

* From p. 68. to p. 92.

ing the method of purſuing manſlayers) ſtatutes, 'That quhairever he happens to be 'taken, that ſcheriffes, ſtuart, or bailie of the 'regality, ſall ſend him to the ſchiriffes of 'the next ſchiriffdom, the quhilk ſall receave 'him, and ſend him to the next ſchiriffe, and 'ſwa forth from ſchiriffe to ſchiriffe, quhill 'he be put to the ſchiriffe of the ſchire where 'the deede was done; and there ſall the law 'be miniſtred to the partee, and *gif it be 'forethought felony he ſall die therefore.*'

James I. parl. 6. act 95. intituled, 'Of 'inquiſition of forethought fellonie to be 'taken by an aſſiſe,' ſtatutes, 'That the of-'ficeares (*i. e.* the judges ordinary) ſall give 'them the knowledge of an aſſize, *quhidder* 'it be forethought fellonie, or ſuddainelie 'done: and, gif it be ſuddainelie done, de-'maine them as the law treatis of before; 'and, gif it be forethought fellonie, demaine 'them as law will.'

James III. parl. 5. act 35. intituled, 'Of 'ſlauchter or forethought fellonie of ſuddain-'tie and flying to girth.' '*Item*, becauſe of 'the eſchewing of great ſlauchter, quhich has 'been richt commoun amang the King's 'liedges nowe of lait, baith of forethought 'fellonie, and of ſuddaintie; and, becauſe mo-'nie perſons commit ſlauchter upon fore-'thought fellonie in truſt, they ſall be de-'fended through the immunitie of the halie

' kirk and girth, and paſſis and remainis in
' ſanctuarees, it is thought expedient in this
' preſent parliament, for the ſtanching of the
' ſaid ſlauchters in time coming, *quhairever*
' *ſlauchter is committed on forethought fellonie*,
' and the committer of the ſaid ſlauchter
' paſſis and puttis him in girth for the ſafe-
' tie of his perſone, the ſcheriffe ſall cum to
' the ordinar in places, quhair he lies under
' his juriſdiction, and in places exempt to
' the lords maſters of the girth, and let them
' wit ſick a man has committed ſick a
' crime on forethought fellonie, *tanquam in-*
' *ſidiator et per induſtriam, for quhilk* the law
' grantis not, nor leavis ſick perſons to joyis
' the immunities of the kirk. And the ſche-
' riffe ſall require the ordinar to let a knaw-
' ledge be taken be an aſſiſe on fifteen daies,
' quhidder it be forethought fellonie or not;
' and gif it be founden forethought fellonie,
' to be puniſht after the the kinges laws:
' And *gif it be founden ſuddentie, to be reſtorit*
' *again to the freedom and immunitie of the*
' *of the halie kirk and girth.*'

James. IV. parl. 3. act 28. intituled,
' Anent manſlayers, taken or fugitive, ſta-
tutes, ' That where onie happens to be ſlain
' within the realme, the manſlayer ſall be
' perſeived (in a certain manner) and quhair-
' ever he happens to be certane, that the
' ſcheriffe ſall incontinent ſend him to the

' next

'next ſcheriffe, and ſwa foorth quhile he be 'put to the ſcheriffe of the ſchire quharr the 'deed was done, and there ſall juſtice be in-'continent done; and gif it be forethought 'fellonie to die therefore.'

James V. parl. 4. act. 23. intituled, 'The 'maſters of the girth ſuld mak deputes quha 'ſuld deliver malefactours that may not 'bruik the priviledge thereof,' ſtatutes, 'That they ſuld halden in all time coming, 'to deliver *all committers of ſlauchter upon 'forethought fellonie,* that flies to girth, and 'uthers treſpaſſers that breakis the ſamen, 'and may not bruik the priviledge thereof, 'conform to the common law, and the act 'of parliament maid thairupon, of before to 'the kings officires aſkand and deſereand 'them to underly the law.'

As to the act 1661, which is no doubt the ſtanding regulating ſtatute in this country with regard to homicide, the panel is adviſed that it is deciſive for him, as it puts our law much upon the ſame footing with that on which the law of England ſtands.

The title of this act is 'Concerning the ſe-'veral degrees of caſual homicide,' Its words are, 'Our Sovereign Lord, &c. for 'removing of all queſtion and doubt that 'may ariſe hereafter in criminal purſuits for 'ſlaughter, ſtatutes and ordains, That the 'caſes of homicide after following, viz. ca-

'ſual

' ſual homicide, homicide in lawful defence,
' and homicide committed upon thieves and
' robbers breaking houſes in the night; or
' in caſe of homicide the time of maſterly
' depredation, or in the purſuit of denounced
' or declared rebels for capital crimes, or
' of ſuch who aſſiſt and defend the re-
' bels and maſterful depredators by arms,
' and by force oppoſe the purſuit and
' apprehending of them, which ſhall hap-
' pen to fall out in time coming, nor any
' of them ſhall not be puniſhed by death;
' and that notwithſtanding of any laws or
' acts of parliament, or any practice made
' heretofore, or obſerved in puniſhing ſlaugh-
' ter: But that the manſlayer, in any of the
' caſes aforeſaid, be aſſoilzied from any cri-
' minal purſuit purſued againſt him for his
' life for the ſaid ſlaughter, before any judge
' criminal within this kingdom. Providing
' always, that in the caſe of homicide caſual,
' and of homicide in defence, notwithſtand-
' ing that a ſlayer is free from capital pu-
' niſhment, yet it ſhall be lieſome to the cri-
' minal judge, with advice of the council, to
' fine in his means to the uſe of the defunct's
' wife and bairns, or neareſt of kin, or to
' impriſon him. And his Majeſty, with
' advice aforeſaid, declares, that all deciſions
' given conform to this act, ſince the 13 Fe-
' bruary 1549 years, ſhall be as ſufficient to

' ſecure

'ſecure all parties intereſted, as if this pre-
'ſent act had been of that date; and that all
'caſes to be decided by any judges of this
'kingdom in relation to *caſual homicide in de-*
'*fence*, committed at any time heretofore,
'ſhall be decided as is above expreſſed.'

* The paſſage quoted from Skene, to prove he thought *chaude melle* capital by our old law, is abſolute nonſenſe as it ſtands; inſtead of theſe words, 'Or caſual homicide by 'chaude melle, the reading ought to be 'not caſually, or by *chaude melle*,' otherwiſe he contradicts himſelf, and cites acts of parliament which prove the contrary of his poſition; and likewiſe he would contradict what he ſays in his treatiſe *de verborum ſignificatione* under *chaude melle*, which he obſerves is in Latin *rixa*: 'A hot ſudden tul-
'zie or debate, which is oppoſed as contrary
'to forethought felony;' and cites the act of James I. But how is it contrary or oppoſite to forethought felony in our law, if the effect or puniſhment of both be the ſame. And upon the words, *forethought felony*, he ſays, 'Foirthoct felony, *precogitata malicia*,
'quilk is done and committed wittinglie
'and willinglie, after deliberation and *ſet*
'purpoſe, it is different from *chaude melle*,
'qui ut ſcribit Cicero, c. 1. offic. In omni

* Infor. p. 33.

'in-

'injuſtitia per multum intereſt utrum per-
'turbatione aliqua animi, quæ plerumq; brevis
'eſt et ad tempus, an conſulto et cogitato fiat
'injuria leviora, enim ſunt ea, quæ repentino
'aliquo motu accidunt, quam quæ me-
'ditata et preparata inferuntur.' From which it is evident, that the authority of Skene is point blank againſt the proſecutors on this queſtion. * And to the ſame purpoſe, Sir James Balfour, Lord Preſident of the Court of Seſſion, in his practics, under the title *Slauchter*, gives the following ſummary of our old law, even before the ſtatutes above-mentioned: And it is, to wit, 'That na
'ſlauchter done be chance or *chaude melle*,
'SOULD BE CALLIT MURDER, for
'all murder is COMMITTIT OF FOIR-
'THOCT FELONIE, &c.' Theſe, and many other authorities that might be quoted from our moſt ancient law-books, ſuch as *Regiam Majeſtatem*, make it clear as the meridian ſun, that, for many centuries before the act 1661, ſlaughter on a ſuddenty was not capital by the law of Scotland; but that it was put on the ſame footing on which it ſtands in England, where it had relief by the benefit of clergy; which, though at firſt too much confined, has for ages paſt been extended to all ſorts of perſons.

* Inform. p. 512.

As it is clear from *the above* recital of the ſtatutes previous to this act, that the diſtinction betwixt ſlaughter of forethought felony, and ſlaughter on ſudden provocation or *chaude melle*, took place in this country; and as that diſtinction is founded upon the principles of juſtice and humanity, it is impoſſible to believe it was meant to be abrogated in 1661, when our law had obtained to ſome degree of maturity, and the notions of our judges and lawyers muſt have been much more liberal than they had been in former times: accordingly the act 1661, was by no means intended to be ſeverer than our former laws; on the contrary, it gives a more certain and conſiſtent remedy than that of girth and ſanctuary, by diſcharging the capital puniſhment to be inflicted; and, at the ſame time, wiſely provides, that bloodſhed, where an exceſs had been committed, ſhould not eſcape altogether, but be puniſhed arbitrarily, according to the circumſtances of the caſe.

This act is a tranſcript of an act that paſſed in 1649, during the uſurpation. Its title above-mentioned, it is clear, was not put upon it unadviſedly; for it is *verbatim* the ſame with the title of the act 1649; and the title itſelf demonſtrates. that by caſual homicide was not underſtood homicide purely accidental; for it is palpable that ſuch homi-

cide admits of no degrees, and is no ways punishable. But the act makes use of casual homicide in the title as a general term that comprehends all homicide not committed from felony aforethought, as a term that comprehends not only homicide, purely accidental or *per infortunium*; but homicide on sudden provocation, homicide in defence, &c. all which kinds of homicide, as already said, may, with great propriety, be termed casual; for the meeting of parties was casual, their quarrel casual, and even the stroke or wound may not improperly be said to be casual, seeing it was not the consequence of deliberation and design, but of a mechanical impulse of nature, and given *casu magis quam voluntate*.

It appears from the act, that either some abuses had crept in, or some doubts had been entertained, which it was desirous to correct and remove; and it does correct and remove them if the panel's interpretation be just, as far as any law could do; for it leaves premeditated murder to be punished capitally as formerly. It discharges other kinds of homicide to be punished with death; but, at the same time, as excesses might very readily be committed, it reserves a power to the Judges of this Court, to inflict an arbitrary punishment in such cases, and nothing can be better sense. Our law is, by this statute,

ſtatute, put upon a ſtill better footing than the law of England; for, by that law, manſlaughter now-a-days always eſcapes with an eluſory puniſhment, though circumſtances muſt very often call for a real one.

To maintain that by caſual homicide, the act means homicide *per infortunium*, is extravagant to the higheſt pitch. The very title, as already ſaid, demonſtrates the contrary; and ſo, in a peculiar manner, does the laſt proviſo, 'That all caſes to be decided by 'any judges of this kingdom, in relation to 'caſual homicide in defence, committed at any 'time heretofore, ſhall be decided as above 'expreſſed.' This affords another invincible argument to prove, that the act by caſual homicide did not underſtand homicide *per infortunium*, but homicide committed *in rixa*, or on a ſudden quarrel; and from this it likewiſe follows, that there is nothing in an obſervation made by the proſecutors, '* That 'if the legiſlator had meant and intended, 'that wilful and intentional homicide, com-'mitted on ſuddenty, was not to be puniſhed 'capitally, it would not have been particu-'larly mentioned;' for it is particularly mentioned as *caſual homicide in defence*, which cannot poſſibly mean any thing elſe. The act wiſely does not enter into a minute explanation of what ſhould be reckoned caſual ho-

* Proſecutors Inform. p. 7.

micide, and what homicide from felony aforethought, for it is impoſſible by general rules to aſcertain them; circumſtances only can do it; but it is clear as ſunſhine, that this ſtatute ties up the hands of the Judges of this Court, from puniſhing with death homicide that ſhall appear not to be committed from felony aforethought, but on a ſudden provocation; though it very properly allows them to inflict an arbitrary puniſhment where there has been an exceſs, or other circumſtances that require it.

The panel having thus ſtated what he takes to be the doctrine of the law of Moſes, of the Roman law, of the commentators on that law, of the law of England, and the law of Scotland; and proved, he is hopeful, that they all agree in this, that homicide on a ſudden quarrel and provocation is not to be puniſhed with death; he ſhall now proceed to conſider, how far that doctrine will avail him in this caſe; or, in other words, to ſhew, that the provocation he received from Lord Eglinton was ſufficient to excuſe, either in whole or in part, the homicide charged againſt him, ſuppoſing, but not admitting, that he committed it intentionally, as the indictment alledges.

Here the panel muſt again call attention to the different ſteps of Lord Eglinton's con-

conduct, and of his own, as ſet forth in the indictment.

And, 1ſt, It is admitted that Lord Eglinton, not the panel, was the provoker, or *auctor rixæ*, which, in all caſes of this kind, is, and always ought to be held, a very material circumſtance.

2dly, That the panel received ſeveral verbal injuries from Lord Eglinton, having been charged with hunting in breach of promiſe, and a demand made upon him for his gun, which every man knows, and muſt feel to be, injurious and affrontive. That verbal injuries alone are ſufficient to juſtify or excuſe homicide, the panel never maintained; a great part of the argument in the information of the proſecutors proceeds upon ſuppoſition that he had; but it is a miſtake: ſome lawyers have indeed thought ſo; but the contrary is no doubt the better opinion; for verbal injuries may be eaſily avoided, and completely redreſſed by retortion; but the panel does maintain, that in computing what amounts to ſufficient provocation, verbal injuries are to be taken into the ſcale. He has no occaſion to plead the point higher, for it is not pretended that upon receiving the verbal injuries juſt now mentioned he fired his piece, or even ſhewed any reſentment; the fact is, that he did not even fail in reſpect, but with much civility and ſubmiſſion en-

deavoured to ſoften his Lordſhip, and abate the paſſion to which he had been inſtigated by Bartleymore.

3dly, Lord Eglinton ſoon proceeded to a real injury, by advancing upon, and aſſaulting the panel, in order to take by force that gun which was his lawful property and poſſeſſion. In order to conſtitute a real injury, it is not neceſſary that hands be laid on, or blows given; it is a real injury, if a hand be lifted, or a cane ſhaken over a man's head, ' * Si quis pulſatus quidem non eſt, ' verum *manus adverſus eum levatæ*, et ſæpe ' territus quaſi vapulaturus, non tamen per- ' cuſſit utili injuriarum actione tenetur." And by parity of reaſon, the advancing upon a man, and obliging him to retire, in order to avoid being ſeized, or thrown down, muſt be a real injury.

4thly, It is alledged in the indictment, that the panel told Lord Eglinton, that he would not give up his gun, but would ſooner ſhoot him; and afterwards confirmed this warning by an oath, his paſſion being by that time rouſed by the continuance of the aſſault.

5thly, The panel retired for a conſiderable time and ſpace from before Lord Eglinton.

† L. 15. par. 1. ff. de injuſ.

6thly,

6thly, The panel in retiring was thrown down with violence upon his back; and this fall, in the eye of law and reaſon, muſt be held to have been given him by Lord Eglinton, for it was his Lordſhip's aſſault that drove the panel upon the ſtone that was the immediate occaſion of his fall; and therefore, it was in reality his Lordſhip's act: ſuppoſe the panel, inſtead of being thrown by this fall upon his back among ſand, had been precipitated from a height, and drowned in the ſea, or bruiſed to death among rocks, would not Lord Eglinton have been anſwerable for his death? moſt certainly; and his Lordſhip would at leaſt have been guilty of culpable homicide, as he was *verſans in re illicita*, and had no title to take the panel's gun by force; and therefore the panel was intitled to reſent this fall, as being the act of Lord Eglinton.

7thly, The indictment does not alledge that the panel fired his piece till he could retire no more: it is evident that he was far from being in a hurry to fire his piece. He once and again threatened that he would do ſo; but that was plainly only to intimidate; for, it is not pretended, that he fired till he fell, till he could retire no more, and till he was more violently agitated and irritated by that accident.

8thly, It will be conſidered, that it is not pretended the panel had any time to cool or reflect,

reflect, for the indictment sets forth, that the piece was fired upon his fall.

9thly, The place where the panel was should be considered. It is admitted he was alone on the sea-shore, where he could not have the interposition of a magistrate, or the succour of neighbours to assist him.

10thly, It is not pretended that the panel had any other weapon than his gun. When a man is assaulted, or otherways injured, and has a variety of weapons about him, some lethal, some not, there may be reason for alledging that he commits an excess, if he uses the lethal, without first trying what the less hurtful will do: but this will not apply to the panel's case, as he had no other weapon but his gun; and the severest criminalists hold, that no excess can be charged against a man who uses the only weapon that he has. Carpzovius himself is express upon this. After inculcating in general, that the defence should be proportioned to the offence; he adds, ' † Quod tamen verum est, nisi ag-
' gressoris robur et fortitudo suppleat quod
' armis ipsius deest, aut *aliud* non sit in *promptu*
' *ipsi insultato ad defendendum telum.* Si enim
' multo major, robustior et fortior fuerit
' agressor quam provocatus, etiam *duriori telo*
' hic illum occidere vel debilitare potest im-

† P. 1. Q. 29. n. 25, 26, 27.

' puna

'pune et ſi aggreſſor *ſolo pugno* vel manu va-
'cua inſultum faciat, aut baculo invadit ali-
'quem, cui inpromptu non ſit aliud inſtru-
'mentum, quam gladius, is bene tueri ſe illo
'gladio poteſt, neque dicetur moderationem
'inculpatæ tutelæ excedere.' Nothing can be more in point than this paſſage, and numberleſs authorities are quoted in ſupport of its doctrine.

If ſuch a ſuit of injuries, verbal and real, do not amount to ſufficient provocation, the panel is at a loſs to comprehend what will. He is perſuaded, that every unprejudiced perſon will be ſenſible that they do. However, for further ſatisfaction, he ſhall produce ſeveral authorities, both foreign and domeſtic, to prove that poſition.

Real injuries, not near ſo atrocious, have been again and again adjudged in England to be ſufficient provocation: '* Neither can 'he,' ſays Hawkins, 'be thought guilty 'of a greater crime (viz. manſlaughter) 'who, finding a man in bed with his wife, 'or being actually ſtruck by him, or pulled 'by the noſe, or filliped upon the forehead, 'immediately kills him; or who happens to 'kill another in a contention for the wall, or 'in the defence of his perſon from an un-'lawful arreſt.' And he cites reports for proving every one of theſe poſitions, and ſeveral

* Pleas of the Crown, vol. 1. p. 82. in fine.

others to the ſame purpoſe, which the panel ſhall not tranſcribe; but ſhall only obſerve, that Baretti was very lately acquitted, though it was proved, and indeed not denied, that he had ſtabbed a man with a knife, and the only provocation was ſhoving him off the pavement into the ſtreet. The panel ſubmits, if the provocation he received was not more than a fillip on the forehead, &c.

And ſeveral perſons have been acquitted for homicide in this country, where the provocation was not greater or ſo great: for the argument upon which Finhaven was acquitted, was, * 'that, if he had killed 'Bridgeton after the provocation above ſet 'forth, it would have been conſtructed only 'as caſual or culpable homicide.' Now the provocation, ſet forth in his defences, was, that he had been thrown into a kennel by Bridgeton. But the libel in that caſe was, and could not but be, found relevant, becauſe the ſpecial matter for the panel was not admitted as it is in this indictment.

In the caſe of William Hunt, mentioned by the proſecutors, the court did, '§ *ſeparatim*, 'find, that the ſtroke being given *in rixa* or 'a tumult, when the defunct was author of 'the tumult or *rixa* himſelf, or that the 'ſtroke was given in defence of the panel,

* See his Information in the trial, p. 37, 38.

§ See their Inform. p. 42.

'or

'or any of his fellow-ſoldiers when attacked, 'relevant to reſtrict the libel to an arbitrary 'puniſhment.'

And in the caſe of Enſign Bruce in 1690, the court 'found this defence, that the panel 'was aſſaulted by the robber, who cried Fire 'upon the dogs, or the like expreſſions, be-'fore any intimation was made to them that 'the guard was come up, relevant to reſtrict 'the libel anent the ſlaughter to an arbitrary 'puniſhment.'

And in the caſe of Bruce of Auchinbowie in the year 1709, the diſtinction betwixt murder and manſlaughter was expreſly admitted by the judges of this court. Bruce, the panel, there pleaded her Majeſty's act of indemnity, in bar of the proſecution: to which it was anſwered, that wilful murder was excepted from the indemnity. But it was replied, that the exception in the act of indemnity only reſpected murder or felony aforethought, not ſlaughter committed on ſuddenty; and the interlocutor of the court 'ſuſtained the defence of her Majeſty's moſt 'gracious act of indemnity, proponed for 'the ſaid panel, relevant to elide the ſaid 'libel.' Does not this deciſion acknowledge, in the moſt expreſs terms, that there was a difference in our law betwixt murder and manſlaughter?

But the case on which the panel chiefly relies, and to which he intreats the utmost attention, is that of Peter Maclean in 1710, which is precisely similar to the present. In that case the interlocutor was in these words: 'Find the 'indictment relevant to infer the pains of 'death, and sustain the defence proponed for 'the panel in these terms, that the defunct 'quarrelled the panel under the name of '*rascal, how durst he carry a fowling-piece,* 'and that if the prince had his own, he durst 'not do so; and adding these words, that 'her Majesty was but a whore, *and there-* '*upon assaulted the panel* for taking the CA- 'RABINE from him, relevant to restrict the 'libel to an *arbitrary* punishment.'

The panel is advised, that this case is not so strong as his; for it is not alledged, that Maclean had retired, or that he had been irritated by a fall before he fired; both which circumstances occur in the panel's case, and must plead strongly in his behalf with every unprejudiced heart. The prosecutors say, this case does not apply, because the gun Maclean had was the King's; but, if such a circumstance could have any influence, it would make Maclean's case rather still more serviceable to the panel; for, if a man may kill another in defence of a gun that is not his property but only his possession, *a fortiori* may he kill in defence of a gun that is not only

only in his poſſeſſion, but is his property; however, it would ſeem, that it was a fowling-piece Maclean had; but this is of no conſequence.

The panel now comes to the ſecond thing propoſed, which was to ſhew, that if a homicide was committed in this caſe, it was juſtifiable, or at leaſt excuſable, becauſe committed in lawful defence againſt an attack upon property, honour, and life; and to ward off, repel, and prevent a danger imminent to all the three.

A man, it is certain, owes many duties to his neighbour; but it is certain, that he likewiſe owes many duties to himſelf; and that theſe laſt are prior, and paramount to the former; for which reaſon, it is obvious, that a man not only may, but that he ought to preſerve his own life, when attacked, though at the expence of the aggreſſor's; and that it is not only lawful for him to do ſo, but that he is blameable if he does not. His blame, perhaps, is carried too far by ſome caſuiſts, who maintain, that a man who, rather than a kill another, ſuffers himſelf to be killed, is *felo de ſe*, or guilty of ſuicide; but he is certainly highly blameable, as he has tranſgreſſed the duty he owes to himſelf, which is prior and preferable to that he owes to others. This is obvious and indiſputably clear from the deſire of ſelf-preſervation, which is implanted in all animals,

animals, and is ſtrongly enforced by the fear and abhorrence of death and deſtruction, which they all feel in the ſtrongeſt degree; whereas the duty men owe to one another is not near ſo powerfully inculcated. If there be an original and moral ſenſe of it, daily experience teaches, that it may be weakened by education or habit, and ſilenced and ſubdued by oppoſite inclinations or deſires. The difference between the ſtimulus to theſe different duties is admirably well expreſſed by Cicero *, 'Eſt igitur hæc, judices, non ſcripta 'ſed nata lex; quam non didicimus, accepi-'mus, legimus, verum ex natura ipſa ar-'ripuimus, hauſimus, expreſſimus; ad quam 'non docti ſed facti, non inſtituti, ſed imbuti 'ſumus; ut ſi vita noſtra in aliquas inſidias, 'ſi in vim, ſi in tela aut latronum, aut ini-'micorum incidiſſet, omnis honeſta ratio eſſet 'expediendæ ſalutis. Silent enim leges inter 'arma, nec ſe expectari jubent, cum ei qui 'expectare velit, ante injuſta pœna luenda 'ſit quam juſta repetenda; etſi perſapienter 'et quodam modo tacite dat ipſa lex poteſta-'tem defendendi.'

And as it is a man's duty to defend his life, ſo likewiſe is it his duty to defend his honour, without which his life, at leaſt in a

* Orat. pro Milone, c. 4.

ſocial ſtate, is of little value. And as it is a man's duty to defend his life and his honour, ſo likewiſe is it his duty to defend his property, without which he cannot enjoy the other two with comfort and pleaſure. The end for which ſociety was originally inſtituted, and the reaſon for which men continue in it, is the preſervation of their being, and well being, that is, the preſervation of life, reputation, and property.

Any perſon who will reflect upon what gave riſe to the formation of ſociety among men, muſt be ſatisfied, that it was the oppreſſion which the weak met with from the ſtrong; when the perſons or poſſeſſions of the weak were attacked by the ſtrong, the natural impulſe of ſelf-preſervation and ſelf-defence made them exert themſelves; but by the ſuperiority of force their reſiſtance was overpowered. This led them to unite, in order that their joint force might accompliſh what individual reſiſtance could not do: from which it is evident, that it never could be the end or intention of any ſet of men, in entering into ſociety, to ſuppreſs and ſupercede the natural exertion of private reſiſtance or defence; but, on the contrary, it is moſt palpable, that the end of their entering into ſociety was to obtain, for that principle, a ſubſidiary and ſuppletory aſſiſtance.

At the ſame time, though it is clear that private reſiſtance or defence was not to be ſuperſeded by the ſocial union, yet private revenge and reparation moſt undoubtedly were. This the public utility and peace required; becauſe, if reparation or revenge were allowed to be taken in that way, it would commonly be unreaſonable and exceſſive, and would beſides give riſe to endleſs tumult and confuſion. Hence it is, that the laws of all countries, though they not only tolerate, but enforce private reſiſtance or defence, yet prohibit and puniſh private reparation or revenge.

This prohibition upon individuals to redreſs or revenge their own wrongs is not at all inconſiſtent with the above explained indulgence, which the law ſhews to the ſudden emotions men feel from injury and provocation; for the law does not juſtify what is done in conſequence of theſe emotions upon this principle, that it is allowable to individuals to redreſs or revenge their own wrongs; it only excuſes them in compaſſion to the frailty of human nature. Hence the law permits no retaliation of wrongs, *ex intervallo*, when the impulſe is over. If that happens, the principle of law, that redreſs of wrongs muſt not be taken by individuals, exerts itſelf with vigour and ſeverity, except in ſome caſes, where redreſs cannot be had from human laws:

laws: even in theſe caſes the ſtatutes of moſt countries have made regulations againſt taking redreſs in that way; but it has commonly been found impracticable to execute them, and therefore ſuch method of redreſs, though prohibited by ſtatutes *in terrorem*, is, however, in a great meaſure connived at every where.

But from the principle, that no man is entitled to uſe violence to redreſs or revenge wrongs already done him, or recover a property or poſſeſſion already taken from him, it by no means follows, that a man is not entitled to uſe violence to *prevent* a wrong from being done him, or to prevent his lawful property or poſſeſſion from being taken from him.

If the law will not allow an individual to redreſs wrongs already done, or to recover a poſſeſſion already taken from him, far leſs will it countenance the man who injuriouſly attacks his neighbour for that purpoſe. It would be abſurd and incongruous in the law to do ſo; for he who makes ſuch attack, flies in the face of all law, contemns its authority, and renounces its protection; and accordingly, the law not only refuſes to protect ſuch perſon, but arms itſelf againſt him. It not only permits the perſon attacked to reſiſt him, but aſſiſts the perſon attacked, if overpowered; and it is not only juſt, but expedient in the

law to give liberty of defence to the perſon attacked. It is juſt, becauſe, though in ſome caſes † human laws may give complete redreſs, in many caſes they cannot, and the more free a country is, the more difficult it is to obtain ſuch redreſs as it can give, as Monteſquieu very juſtly remarks.

It would be unjuſt in the law to make the perſon attacked omit a complete remedy, which he has in his own hand, and betake himſelf to a remedy almoſt always defective, and ſometimes totally unavailable for obtaining redreſs, which is the caſe with regard to life and honour, and, for the moſt part, even with regard to property, as ſhall be ſhewn at large afterwards.

It would be inexpedient in law to do ſo; becauſe, ſo apt are men to tranſgreſs againſt one another, that every preventive check is neceſſary; and the firſt and moſt efficacious of all is the dread of the principle of reſentment and ſelf-preſervation, which the aggreſſor is conſcious his attack muſt rouſe in the perſon offended. The interpoſition of the law is juſtly made ſubſidiary to this principle; but fooliſh and fatal would it be to make it ſuſpenſive of it; for it is evident, that robberies, murders, and crimes of all ſorts, would be infinitely more frequent if the hands of indi-

† De l'Eſprit des Loix.

viduals

viduals were tied up from reſiſting them: and therefore they never were, by the laws of any country, tied up from reſiſtance or defence in order to prevent wrongs from being done.

The laſt reſtriction is abſolutely neceſſary; becauſe, without it, every wrong or breach of the peace would occaſion another. But before a wrong or injury is done, and while it is attempting, the aggreſſor is violating the law, and diſturbing the peace; ſo that nothing would be gained to either, by diſcharging reſiſtance and defence. On the contrary, ſuch prohibition would have the very worſt conſequences both to the law and the public peace, as it would be a ſpur to violence and outrage on the part of wicked men, and bring an inſufferable hardſhip on the good ſubject and citizen, who would be obliged to ſubmit to injuries, for which the law can almoſt never give him complete redreſs, and for the moſt part but a very inadequate compenſation. For theſe reaſons, the law of every country permits violence to be uſed in lawful defence. The expediency is clear, and ſo is the juſtice; for when a man attacks the perſon or property of another, he contemns and renounces the laws of ſociety, and brings himſelf and the perſon attacked into a ſtate of nature; and by the law of nature they muſt be judged, unleſs municipal regulations come in the way; for the law of nature is the common law of every

country, except in ſo far as it is modelled and reſtricted by the municipal law.

This reaſoning is important, and the panel hopes it is clear and convincing. He is perſuaded every man's own reflections and feelings will tell him it is ſo; ſo that the quotation of many authorities would be unneceſſary.—*Non tali auxilio.* However the panel ſhall ſtate ſome that are capital. 'Qui cum aliter 'tueri ſe non poſſunt, damni culpam dederint, 'innoxii ſunt, vim enim vi defendere, omnes 'leges, omniaque jura permittunt. Sed ſi 'defendendi mei cauſa, lapidem in adverſa-'rium miſero, ſed non eum ſed prætereuntem 'percuſſero, tenebor lege aquilia. *Illum enim 'ſolum qui vim infert ferire conceditur, et hoc 'ſi tuendi dumtaxat, non etiam ulciſcendi cauſa 'factum ſit.*' L. 45. § 4. ff. ad leg. Aquil.

'Eum igitur qui cum armis venit, poſſu-'mus armis repellere; ſed hoc *confeſtim non 'ex intervallo.* Dummodo ſciamus non ſolum 'reſiſtere permiſſum ne dejiciatur, ſed etſi 'dejectus quis fuerit eundem dejicere non 'ex intervallo ſed ex incontinenti.' L. 3. §. 9. ff. de vi et vi armata.

Lord Stair is likewiſe expreſs upon this diſtinction. His words are: '† The entry to 'poſſeſs that which is already poſſeſſed, muſt 'expel the prior, or elſe introduce a partial

† Inſt. p. 174.

'and

'and common poſſeſſion; yet it is not the 'contrary attempts, or every act that expels 'the prior poſſeſſor; but if the ſame be vio-'lent, the prior poſſeſſor hath the benefit of 'a poſſeſſory judgment, *and may lawfully uſe* '*violence to continue in poſſeſſion*, which after-'wards he may not for recovery thereof, 'when it is loſt, though unwarrantably or vi-'olently, unleſs it be *ex incontinenti*.'

To the ſame purpoſe Lord Bankton. 'No doubt one with us may continue or re-'cover his poſſeſſion by force, being *ex incon-'tinenti*, or inſtantly before the other party 'has got the poſſeſſion; for after that he muſt 'take the legal courſe, and not *ſibi jus dicere*, 'do right to himſelf.'

Since then it is clearly lawful to uſe force and violence in defence, the utmoſt degree of them muſt be permitted if neceſſary. That muſt be permitted if neceſſary to defend life; that muſt be permitted if neceſſary to defend honour; that muſt be permitted if neceſſary to defend property. The defence of the perſon is indeed the moſt important, and makes the greateſt figure in the imagination; but the defence of the other two is equally lawful, where there is a neceſſity, which muſt be underſtood *ſecundum ſubjectam materiam*, and the *moderamen inculpatæ tutelæ* is obſerved in all of them, when their preſervation cannot be otherwiſe effected. And ſo is to be underſtood

ſtood *L.* 1. *cod. unde vi.* 'Recte poſſidente ad 'defendendam poſſeſſionem, quam ſine vitio 'tenebat inculpatæ tutelæ, moderatione illa-'tam vim propulſore licet.'

This is clear from various texts of the civil law, the doctrine of which is very well ſummed up by Heineccius in theſe words: '† Quo in primis moderamen inculpatæ tute-'læ pertinet, quoquis adgreſſorem, vi injuſta 'irruentem, imminenti vitæ, corpori, rebuſve '*periculo* incontinenti tuendi ſua cauſa oc-'cidit.'

Gomez, in his treatiſe *de Homicidio*, has a paſſage that is very applicable in many particulars to this caſe, eſpecially as to the preſent point. He is there talking of defence of the perſon; and after ſeveral obſervations, he adds this one: 'Etiamſi aggreſſor veniat et 'reſultet contra alium diverſo genere armo-'rum, puta cum baculo, ligno vel inſtrumen-'to, animo percutiendi, et inferendi ſibi in-'juriam, nam aggreſſus poteſt ei reſiſtere, 'et ſe defendere cum enſe vel ferro, vel quo-'vis alio inſtrumento fortiori: et ſi eum 'occidat cum aliter ab illa injuria non poſſet 'evadere, non tenetur aliqua pœna, quia 'talis defenſio eſt licita *pro defenſione rerum*, 'ut in L. furem ff. ad leg. Corn. de ſic. et 'in L. itaque ff. at L. Apud. et in L. 3.

† Pand. lib. 9. § 185.

§ cum

' § cum igitur ff. de vi armata; et in L. 1.
' C. Unde vi, cum ſimil. ergo a fortiori pro
' defenſione perſonæ et honoris quæ dignior
' eſt, ut in L. in ſervorem, § fin. ff. do pœ-
' nis, cujus pulchra verba ſunt. Quia et
' ſolus fuſtium ictus gravior eſt quam pecu-
' niara damnatio; ut in L. Julianus, verſi-
' cul. 1. ff. Si quis omiſſa cauſa teſtamenti.
' Imo quod magis eſt, hoc procedit et habet
' locum eadem ratione, etiamſi aggreſſor ve-
' niat et reſultet contra alium ſine aliquo ge-
' nere armorum, ſed tantum *manu vacua* mi-
' nans eum, et volens alapam prebere; nam
' ſi aggreſſus aliter illam injuriam, evadere,
' non poſſit licite poterit eum occidere; et in
' expreſſo ita tenet Bald.'

The ſame doctrine is taught by Grotius:
' † Veniamus ad injurias quibus res noſtræ
' impetuntur. Si expletricem juſtitiam reſpi-
' cimus, non negabo ad res conſervandas rap-
' torem, ſi ita opus eſt, vel interfici poſſe; nam
' quæ inter rem et vitam eſt inæqualitas ea,
' favore innocentis eſt raptoris odio, compen-
' ſatur, ut ſupra diximus. Unde ſequitur ſi
' ad jus ſolum reſpiciamus poſſe furem cum
' re fugienten, ſi aliter res recuperari ne-
' queat, jaculo proſterni. Demoſthenes ora-
' tione in Ariſtocratem. Nonne hoc per
' Deos durum atque injuſtum eſt, nec ſcriptis

† De jure belli, c. 1. l. 2. § 11.

'tantum legibus, ſed et communi inter hó-
'mines legi contrarium, ut non ſinar vi uti
'adverſus eum qui hoſtiliter res meas ra-
'piat? Nec obſtat caritas per módum præ-
'cepti, lege divina humanaque ſepoſita, niſi
'res ſit que minimum valeat, ac proinde
'contemni mereatur: quam exceptionem
'recte nonnulli adjiciunt.'

Cocceius, chancellor to the King of Pruſſia, a lawyer whoſe works have the greateſt repútation and authority over all Europe, in his commentary on the above paſſage of Grotius, expreſſes himſelf thus:—'Nos jure naturæ
'etiam pro defenſione rerum occidi furem
'poſſe ſtatuimus: idque ex rationibus ſupra,
'allatis extra omne dubium ponitur, ubi ſi-
'mul probavimus evangelii legem jus hoc
'naturæ, quod in ſuo genere perfectum eſt,
'non improbare, nedum tollere; ſed ſaltem
'nobis inculcare perfectius et generoſius
'eſſe ammittere rem ſuam, quam jure ſuo
'cum internecione alterius uti.' And ſoon after he adds, 'Quod jus arcendi injuriam
'non oriatur ex aliqua proportione, neque
'ex qualitate injuriæ, ſed ex jure neceſſa-
'riæ defenſiones, vi cujus omnia mihi licent
'ſine quo jus a natura mihi conceſſum etſi
'*minimum*, et exigui momenti ſalvum eſſe
'non poteſt.'

And the ſame great author, in his treatiſe, intituled, Introductio ad Grotium illuſtratum,

tum, in treating of *bellum privatum*, holds killing to be lawful: '† Si periculum eſt 'mutilationis membri, vel violationis pudi-'citiæ; ſi periculum imminet accipiendæ 'alapæ, aut mali ſimilis; ſi de defenſione 'rerum noſtrarum agitur, etiam ſi ſit *res* '*minima.*'

The law of England is alſo expreſs upon this point; Hawkins*, to confirm his poſition, That one may kill another who attempts to kill him, ſupports it by this argument: 'Is 'not he who attempts to murder me more 'injurious than he who barely attempts to 'rob me?' Indeed that one may kill in defence of his goods in England, is a propoſition that has been innumerable times illuſtrated by examples in that country, where robberies are extremely frequent.

Neither was this ever doubted of in this country, and that ſo the law ſtands is admitted by the proſecutors in their information‡. 'It 'may be lawful (ſay they) in defence of one's 'property, to kill a robber who feloniouſly 'endeavours to bereave him of it; becauſe 'without ſo doing his property may be loſt.' And this holds not only of robbers by night, but likewiſe of robbers by day. For though the act 1661 diſcharges the killers of robbers

† L. 7. c. 2.
* Vol. I. p. 72. ‡ Page 17. in fine.

by night from puniſhment altogether, whatever the circumſtances of the ſlaughter may be, it does not from thence follow, that the killer of a robber by day is to be puniſhed. Such killing falls under the general exception of the ſtatute of caſual homicide in ſelf-defence, which by the ſtatute cannot be capitally puniſhed, though in particular circumſtances it may be arbitrarily.

The law of nature, as has been already ſaid, is the law of every country, excepting in ſo far as it is modelled and reſtricted by municipal ſtatutes. Our ſtatute 1661 is far from abrogating the natural right of defence. On the contrary, it tolerates and protects it in the greateſt latitude, and for that purpoſe uſes the very general expreſſion of *lawful defence*. It does not uſe the expreſſion in *ſelf-defence*, for that might be thought only to extend to the defence of the perſon, or life; but it uſes the comprehenſive expreſſion of *lawful defence*, which extends not only to the defence of the perſon and life, but to the defence of reputation and goods.

From what has been argued it is clearly eſtabliſhed, that it is lawful to kill in defence of one's goods; and this propoſition is not controverted in the information for the proſecutors, in which they endeavour to ſhew, that it cannot avail the panel, becauſe of the particular circumſtances of the caſe: and their argu-

argument is *, 'That no man is intitled to 'kill in defence of his property, unleſs when 'he is attacked with a felonious intention to 'rob and bereave him of his property; but 'where the perſon who makes the attack has 'clearly no felonious intention, but only un-'der an erroneous apprehenſion of his own 'right, commits a treſpaſs upon the property 'of his neighbour, and for which redreſs can 'eaſily be had in a court of law, in ſo far as 'the party has been injured. The law of no 'civilized country will, in theſe circum-'ſtances, allow a perſon to kill another under 'the pretence of defending his property.' And they afterwards apply this poſition to the preſent caſe, as follows: 'It is plain, that the 'deceaſed Earl had no ſuch intention. He 'could not have been charged as being guilty 'of felony, if, *de facto*, he had ſeized and 'carried off the panel's gun: he did not 'thereby intend feloniouſly to rob and be-'reave the panel of his property. He was 'led to make the demand under the belief 'and apprehenſion, that the law intitled him 'to make the ſeizure. Whether he was 'right or wrong in that apprehenſion, is to 'the preſent iſſue very immaterial. If he 'was miſtaken, all that could be charged 'againſt him, if he carried off the gun, was

* Informat. p. 16.

'a com-

ſhip's motive was not ſuch, without any proof, which it is abſolutely impoſſible to bring as to intentions.

Lord Eglinton, it has been already ſhewn, had no right, by the game-law, to take this gun; the matter therefore comes to be tried by the common law, and by it, it is clearly *prima facie* robbery; and an indictment for robbery might have been moſt relevantly drawn againſt his Lordſhip; and, if he had demurred to the relevancy upon this, that he was entitled to take the gun by the game-law, that plea, for the reaſons above explained, moſt certainly would have been overruled. At the ſame time, it is poſſible, nay highly probable, that Lord Eglinton would not have been found guilty of robbery by any jury upon the above indictment; for the caſe of a panel is always favourable, and the law ought never to be ſtretched againſt him; and therefore the jury, in all probability, would have liſtened to his plea, that he had been led to commit the violence from an erroneous apprehenſion of the game-law, and, from different circumſtances, would have preſumed that his motive was anxiety for preſervation of the game, and puniſhment of one whom he took to be a tranſgreſſor. But though it were certain that Lord Eglinton would have been thus gently dealt with by a jury, and though it were clear that ſuch an equitable ſtretch in

his favours were right; yet it does by no means therefrom follow, that what was certainly robbery in ſtrict law ſhall be held by interpretation not to be robbery, in order to come at the panel's life. However excuſable and proper it may be to make equitable ſtretches and conſtructions, in order to ſave a man's life, it would be unprecedented and moſt unjuſt to make ſuch ſtretches and conſtructions, in order to take it.

However, the panel's defence will not be hurt, though it ſhould be reckoned clear in point of law, that this was not a robbery in Lord Eglinton. It is ſufficient, that it be an unlawful and *violent* attempt to take his property from him; and there can be no doubt it was that. It was what is called *vis privata*, by the Roman law; a treſpaſs *vi et armis*, by the law of England, and what is called a ſpulzie in the law of this country, and a ſpulzie aggravated by the concomitant circumſtaces of force and fear.

The panel has no occaſion to maintain, that it is juſtifiable to kill a man treſpaſſing privately, *clam*, and by ſtealth; but he does maintain, and it is eſtabliſhed by the authority of all laws and lawyers, that it is juſtifiable, or at leaſt excuſable, to kill a treſpaſſer who uſes violence. This is even laid down by

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'an ille ſit irregularis qui hominem occiderit, 'non ad propriæ vitæ neceſſariam defenſio-'nem, ſed ad patrimonii & rerum tutelam, '& ſane probatur hunc non eſſe irregularem, 'quia licitum eſt cuique defendere proprias 'res, et ad earum neceſſariam defenſionem 'hominem invaſorem occidere: nempe eo 'caſu quo res aliter defendi non poteſt ab in-'vaſione et rapina.' He then proceeds to ſtate ſome doubts and difficulties, which he clears by ſtating different caſes; two of which are very much to the preſent purpoſe: Pro-'ponitur ea ſpecies in qua contingit homici-'dium ad neceſſariam defenſionem rerum, ne 'ab aggreſſore capiantur; & profecto licitum 'eſſe hoc homicidium, deducitur ex multis, 'quæ ſuperius adducta fuere; preſertim ubi 'raptor bonorum defendentem res proprias a 'rapina, vult offendere quo ad perſonam; 'quemadmodum frequentiſſime accedere po-'terit: nam cum quis a raptore defendit res 'proprias, aut raptor abſtinet a rapina, & tunc 'jam nullius occiſionis adeſt caſus, aut ipſe 'contendit, ad huc invito defenſore, res ra-'pere, non poteſt ea contentio expediri abſ-'que injuria & damno perſonali defenſoris, 'idcirco homicidium inde ſecutum pertinet 'ad defenſionem perſonæ ſimul & rerum.'

This is in point to the preſent caſe, for the panel's property was annexed to his perſon, and ſo both were, and could not but be, at-

attacked at once. Had Lord Eglinton got hold of the panel, it is clear he muſt, and would have mal-treated his perſon, in order to get his property from him; and his ſending for the gun demonſtrates, that he was reſolved to maſter and deſtroy the perſon, in order to take the property. There is very good reaſon for holding, that it is culpable to kill a treſpaſſer *by ſtealth*, and that it is juſtifiable to kill a treſpaſſer by violence, from the former there is no danger, but there is from the latter, eſpecially, if paſſion and reſentment give riſe to the treſpaſs, and if the property which the treſpaſſer wants to take be a weapon; which was the caſe here. Lord Eglinton was, and could not but be in the fire and fury of paſſion; anxiety for the preſervation of the game was his foible, and he muſt have been provoked by the panel's imagined tranſgreſſion upon it. He muſt have been greatly irritated by the panel's refuſing to give up his gun, and heated to the utmoſt pitch by the panel's threatning to ſhoot him rather than give it up. Indeed, this is but too evident from his Lordſhip's expoſing himſelf ſo long to a loaded fowling-piece, which the indictment ſays was cocked, and preſented at him, and the exceſs of his rage is put out of all doubt, by his ſending for his own gun to ſhoot the panel. The panel, therefore, had all the reaſon in the world to expect, that if

his Lordſhip got poſſeſſion of the panel's gun, he would have put him to death with it? He had not indeed reaſon to expect this, when Lord Eglinton came firſt up to him, and demanded his gun; and it is to that period that part of the declaration mentioned by the proſecutors refers; * but, he had all the reaſon in the world to expect it, after his Lordſhip had been irritated and provoked by the circumſtances above-mentioned; and the panel, if neceſſary, can prove, that Lord Eglinton ſometimes beat people with their own guns, after he had taken them; what then would he not have done to the panel who had ſo much provoked him?

The Engliſh authorities are likeways clear for the panel upon this point. § Thus Hawkins, 'Neither can a man *juſtify* the 'killing of another in defence of his houſe, 'or goods, or even of his perſon, from a 'bare private treſpaſs; and therefore, he 'that kills another, who, claiming a title to 'his houſe, attempts to enter it by *force* and 'ſhoots at him, or that breaks open his 'windows, in order to arreſt him, or that '*perſiſts* in breaking his hedges, after he is 'forbidden, is *guilty of man-ſlaughter*. And 'he who, in his own defence, kills another, 'who aſſaults him in his own houſe in the

* Infor. p. 22. § Vol. I. p. 72.

'day-

'day-time, and plainly appears to intend to 'beat him, only is guilty of homicide, *se defendendo*, for which he forfeits his goods, 'but is pardoned of courſe; yet, it ſeems 'that a private perſon, and, *a fortiori*, an 'officer of juſtice, who happens inavoidably 'to kill another in endeavouring to defend 'himſelf from, or ſuppreſs dangerous rioters, 'may juſtify the fact, inaſmuch as he 'only does his duty in aid of public juſ-'tice.'

Here it is moſt juſtly laid down, that killing a treſpaſſer by force, though perhaps not ſtrictly juſtifiable, is at leaſt excuſable, ſo as to be held only manſlaughter, the puniſhment of which is eluſory. This paſſage is much more accurate than that * quoted by the proſecutors from an after-part of the book, which at firſt will appear to be inconſiſtent with the former: but it will not appear to be ſo upon reading the whole paſſage, of which the proſecutors only tranſcribe a part, becauſe of the limitation it contains, and the authority upon which it is grounded, which is a paſſage in Keylynge †, which ſuppoſes the treſpaſs to be already done, and confirms the diſtinction above eſtabliſhed between *redreſſing* and *preventing*.

* Inform. p. 19. † P. 131.

The laſt authority the panel ſhall quote upon this point, is a very capital one, being no leſs than that of Lord Chief Juſtice Hale; his words are, * 'If a man comes 'to take my goods as a *treſpaſſer*, I may '*juſtify* the beating of him in defence of 'my goods, as hath been ſaid: BUT IF I 'KILL HIM, IT IS MAN-SLAUGHTER.' What anſwer can the proſecutors make to this, or what anſwer to the deciſion of this court in Maclean's caſe, which goes upon the ſame principle?

† The authorities quoted from the law of England by the proſecutors do not in the leaſt impugn the above doctrine: on the contrary, they ſupport it. Foſter ſays, 'The 'injured party may repel force with force in 'defence of his perſon, habitation, or *pro-* 'perty, againſt one who manifeſtly in- 'tendeth or endeavoureth, with violence or 'ſurprize, to commit a known felony upon 'either.' The panel ſays, that Lord Eglinton did attempt, with violence and ſurprize, to commit a known felony upon his property. But ſuppoſing it was only a treſpaſs, where hath Foſter ſaid, that the killer of a violent treſpaſſer is guilty of murder? Blackſtone's doctrine is the ſame with his.

* Pleas of the Crown, vol. 1. 48. C. in fin.
† Inform. p. 18.

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As to the authority of Puffendorff, which the profecutors refer to, upon examination it will be found to be againſt them. In a paſſage previous to that quoted by the profecutors, he expreſſes himſelf thus: 'Mais, lors 'que ces voies de douceur ne ſuffiſent pas 'pour nous ſauver, ou pour nous mettre en 'ſureté, il faut en venir aux mains. En ce 'cas là, ſi l'aggreſſeur continue malicieuſe-'ment à nous inſulter, ſans etre touché d' 'aucun repentir de ſes mauvais deſſeins qui le 'porte à vouloir deſormais vivre en paix avec 'nous, on peut le repouſſer de toutes ſes 'forces en le tuant même, s'il eſt beſoin; et 'cela non ſeulement lors qu'il attaque direc-'tement notre vie, mais encore s'il ne veut 'que nous battre, nous meurtrir, ou nous 'priver de quelque membre qui ne ſoit pas 'abſoluement neceſſaire, ou nous *depouiller* '*de notre bien*: Car on n'a aucune aſſurance, 'que de *commencemens* il n'en viendra pas à 'plus grandes injures; et des la qu'un homme 'ſe declare notre ennemi, comme il le fait 'en nous inſultant ſans nous en temoigner 'enſuite aucun deplaiſir il nous donne en 'tant qu'en lui eſt, une pleine, et entiere 'permiſſion d'agir contre lui de toutes nos 'forces, ſans mettre aucunes bornes à notre 'juſte defenſe.'

* Barbeyrac's Puffendorff, Droit des Gens, p. 256.

Ths

This he holds to be the law of nature; and though indeed, in the paſſage quoted by the proſecutors, he ſeems to think it ought to be ſomewhat limited in a ſtate of ſociety; yet it is plain his limitation chiefly points at the redreſſing or revenging wrongs already done; for he admits the right *repouſſer* or *depellere*, in order to prevent an irreparable loſs: what he reckons ſuch, he does not ſay.

But, with great ſubmiſſion to him, if the law of nature ſtands as he ſays in the firſt paragraph, there is no foundation, even in the ſocial ſtate, for limiting the right of preventing wrongs: for the law of nature is the common law of every country, except in ſo far as already ſaid, it is modelled and reſtricted by the municipal law. However, be his opinion what it may, it can never be put in oppoſition to the accumulated authorities above ſtated of the moſt eminent German and Engliſh Lawyers. Beſides he has no where ſaid, that homicide in defence of goods is murder, and not manſlaughter. This, in a ſubſequent paſſage, he leaves intirely to be regulated by the municipal laws of different countries; and to be ſure, from what he ſays in the firſt paſſage, he thought there was nothing immoral in killing in defence of goods, nor any thing improper in legiſlatures regulating defence in what manner they think expedient; and to theſe regulations, he ſays, their

their ſubjects ſhould conform. * ‘ Mais ‘ dans une ſocieté civile on n'a pas à ‘ beaucoup pres une liberté auſſi etendue de ‘ defendre ſes biens, à main armée, et la raiſon ‘ en eſt claire. Car ſi pour la moindre in- ‘ jure on pouvoit en venir à des actes de hoſ- ‘ tilité contre un concitoyen, ce ſeroit une ‘ ſource de troubles et de deſordres perpe- ‘ tuels. On ne doit donc uſer de ce droit, ‘ qu'autant que la conſtitution du gouvern- ‘ ment civile et les loix particulieres de l'etat ‘ nous le permettent. Ou quoique les legiſ- ‘ lateurs puiſſent laiſſer à chacun une pleine ‘ liberté de repouſſer un aggreſſeur juſqu'á ‘ lui rendre un plus grand mal que celui ‘ qu'il vouloit faire, cependant ils defendent ‘ d'ordinaire aux particulier de ſe porter aux ‘ derniers extremitez pour ne pas ſe laiſſer ‘ ravir une choſe qui n'eſt pas irreparable.’

The law of this country, it has been already proved, permits homicide in defence, in the utmoſt latitude; and indeed it would have been very unnatural if it had not; as otherwiſe the men of the moſt generous ſpirit in it muſt have been enſnared, and its beſt blood injuſtly ſhed on the ſcaffold, becauſe of the *præfervidium Scotorum ingenium*, which has always impreſſed them with a high ſenſe of honour, and impelled them to quickneſs of reſentment; on which account, the motto of the country is *nemo me impune laceſſet*.

* Pag. 273.

The profecutors are pleafed to obſerve, that if the panel's † doctrine were ſolid, it would follow, that Lord Eglinton might have been juſtified for killing the panel, in attempting to come upon his Lordſhip's lands againſt his will.

To this the panel anſwers, that ſuppoſing his Lordſhip to have had a title to hinder the panel from coming upon his lands, a homicide committed by his Lordſhip upon him, ſo treſpaſſing, would have been murder, or juſtifiable or excuſable homicide, according to circumſtances. If the treſpaſs had been done by ſtealth, the homicide would either have been murder or homicide highly culpable. If done violently with danger, or offence to his Lordſhip's perſon, the homicide would either have been juſtifiable or excuſable homicide.

* The profecutors are likewiſe pleaſed to ſay, that if an heretor, who is not well acquainted with his marches, ſhould attempt to poind his neighbour's cattle, which *de facto* were not treſpaſſing upon his property, it is impoſſible to maintain that a homicide committed upon him, by the proprietor of ſuch cattle, would be juſtifiable, though the cattle really were upon their maſter's ground.

† Inform. p. 16. * Inform. p. 17.

To

To this the panel anſwers, that it is perfectly clear, that if ſuch pointing were attempted by force, and the pointer warned of of his danger, the homicide would at leaſt be excuſable, ſo as to amount to no more than manſlaughter.

The narrowneſs of this country has prevented ſuch caſes from occurring in it; but in England many ſuch caſes have happened, and in England homicide in caſes, much narrower than any of the caſes above put, has been adjudged to be manſlaughter, as will appear from the following authorities. Hawkins juſtly ſet forth, that, * 'the killing of an 'officer would, in ſome caſes, be man-'ſlaughter only. Where the warrant upon 'which he acts, gives him no authority to 'arreſt the party; as where a bailiff arreſts 'J. S. a baronet, who never was knighted: 'where a good warrant is executed in an 'unlawful manner; as if a bailiff be killed 'in breaking open a door or window to 'arreſt man; or perhaps if he arreſt one on 'a Sunday, ſince 29 Car. 2. chap 7. by which 'all ſuch arreſts are made unlawful.'

To the ſame purpoſe Foſter, whoſe authority the proſecutors acknowledge, ‡ 'In 'the caſe of arreſts upon proceſs, whether 'by writ or warrant, if the officer named in

* Page 86. ‡ Dif. 2. c. 8. § 7, 8, 9.

'the *proceſs* give notice of his authority, and 'reſiſtance is made, and the officer killed, 'it will be murder; if in fact ſuch notifica-'tion was made, and the proceſs *legal*; for 'after ſuch notification, the parties oppoſing 'the arreſt acted at their own peril.' 'I have ſaid above, by way of caution, 'if the proceſs be *legal*; but I would not 'be underſtood to mean any thing more than 'provided the proceſs, by writ or warrant, 'be not defective in the frame of it, and iſſue 'in the ordinary courſe of juſtice from a 'court or magiſtrate having juriſdiction of 'the caſe. But if the proceſs be defective 'in the frame of it, as if there be a miſtake 'in the name or addition of the perſon on 'whom it is to be executed; or if the name 'of ſuch perſon, or of the officer, be inſerted 'without authority, and after the iſſuing of 'the proceſs; or the officer exceedeth the 'limits of his authority, and is killed, this will 'amount to no more than manſlaughter in 'the perſon whoſe liberty is ſo invaded.'

Theſe authorities afford a good anſwer to the caſes put for the proſecutors, and an invincible argument for the panel in this affair. For the moſt favourable light in which Lord Eglinton's attack can be viewed, is that of an unlawful or erroneous *private* arreſt. Now, if homicide in defence againſt an erroneous *public* arreſt be excuſable, much more

more muſt homicide be excuſable in defence againſt an erroneous *private* arreſt. And it is clear, the doctrine of the law of England on this point is moſt excellent good ſenſe; for he who attacks another's perſon or property with violence, does it at his peril. If the attack was warranted by law, the homicide will be murder; if not, the homicide will be, and ought to be, no more than manſlaughter. This is ſtill clearer in violent private arreſts or treſpaſſes. Mankind, no doubt, ought to curb their paſſions, and it is one of the chief objects of law to reſtrain them: but then the paſſion of the aggreſſor is the *origo mali*; that neceſſarily rouſes the paſſion of the perſon attacked, and the ſhewing ſome indulgence to his paſſion, can have no bad effect in ſociety. On the contrary, it has a manifeſt tendency to preſerve good order and peace, by affording an immediate and effectual check to lawleſs aggreſſors.

As to the argument drawn from the property in queſtion being but a gun, and conſequently of no conſiderable value, there is nothing in it. A proſecution for theft would have lain againſt any perſon who had ſtole this gun, or who had robbed the panel of it*. Indeed, the violent taking away from the per-

* Hawkins, vol. I. p. 65.

ſon of another goods of any value, and putting him in fear, is robbery. However, if the value were to enter into conſideration, that would not avail the proſecutors; for the gun was very valuable.

But the value does not at all enter into conſideration, for this, among other reaſons, that the value of a ſubject depends upon the opinion and affection of the proprietor*; and this holds in all ſorts of property †, in immoveables, moveables, and animals, for which the proprietor may have, and commonly actually has, an infinite greater value than indifferent perſons. This is called the *pretium affectionis*, and takes its riſe from *the aſſociation of ideas* which has a great effect upon the human mind. Hence a man has a *pretium affectionis* for the farm in which he was born, or has cultivated himſelf.

In the ſame way a man has a *pretium affectionis* for an animal he has bred up and cheriſhed. This is beautifully illuſtrated in Nathan's parable to David ‡: 'He came unto 'him, and ſaid unto him, There were two 'men in one city, the one rich and the other 'poor. The rich man had exceeding many 'flocks and herds, but the poor man had no'thing ſave one ewe-lamb, which he had 'bought and nouriſhed up, and it grew up

* See Locke's Eſſay, Book 2. c. 83.

‡ 2 Sam. ch. xii. ver. 1. *et ſeq.*

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'together with him and his children; it did 'eat of his own meat, and drank of his own 'cup, and lay in his boſom, and was unto 'him as a daughter: and there came a tra-'veller unto the rich man, and he ſpared to 'take of his own flock and of his own herd 'to dreſs for the wayfaring man that was 'come unto him; but took the poor man's 'lamb and dreſſed it for the man that was 'come to him. And David's anger was 'greatly kindled againſt the man; and he 'ſaid to Nathan, As the Lord liveth, the 'man that hath done this thing ſhall ſurely 'die.'

This is a deciſion of a judge after God's own heart, which proves that the value is immaterial; and if that judge thought it was juſt to puniſh the rich man with death, after he had taken away the lamb, he alſo muſt have thought it juſt in the poor man to have reſiſted the rich man, even to the laſt extremity, in defence of the lamb.

And even for trifling moveables men have the ſame *pretium affectionis*. There are few perſons who have not had in their poſſeſſion, ſome time or other, moveables which to them were of ineſtimable value from the aſſociation of ideas, though to others they would appear trifling, ſuch as a ring, a cane, &c. This feeling was well underſtood by an author juſtly celebrated for his knowledge of human nature;

nature; and upon it one of his moſt maſterly performances is founded, the cataſtrophe being accompliſhed by the loſs of a handkerchief. He introduces a huſband giving his wife a handkerchief, with this ſolemn inſtruction:

Make it a darling like your precious eye;
To loſe't or give't away were ſuch perdition
As nothing elſe could match.——

The panel had the ſame feeling and *pretium affectionis* for his gun, which was a valuable one and an old companion; and the circumſtance of his being an old ſoldier contributed much to make him determined rather to part with life than with his gun. Every ſoldier reckons it the greateſt diſgrace to have his arms taken from him: no wonder then the panel thought, with regard to his gun, that

To loſe't or give't away were ſuch perdition
As nothing elſe could match.

As to the argument, that the law ought not to allow killing in defence of property, becauſe that may be recovered by legal proceſs, there is nothing in it either.

The legal remedy, in order to obtain reſtitution and reparation, muſt and cannot but be

be extremely defective; unleſs the robber or treſpaſſer pleaſe, it never can give reſtitution, except in the caſe of unmoveables, ſuch as land or houſes; and even theſe the invader may damage irreparably, by deſtroying the planting on an eſtate, the paintings and ornaments in a houſe, &c. but in moveables, after the poſſeſſion is taken away, the property is for ever gone, unleſs the robber or treſpaſſer pleaſes; for he may put them away or deſtroy them; it is only in things called fungible, ſuch as money, that reſtitution can certainly be got.

And, as to reparation by damages and coſts, they are very ſeldom given to the full extent, and a *pretium affectionis* is never allowed *. 'Sextus quoque Pedius ait, pretia rerum non 'ex affectione, nec utilitate ſingulorum, ſed 'communiter fungi. Itaque eum qui filium 'naturalem poſſidet, non eo locupletiorem 'eſſe, quod eum plurimo, ſi alius poſſiderit 'redempturus fuit. Nec illum qui filium 'alienum poſſiderit tantum habere quanti 'eum patre vendere poſſet. In lege enim 'aquilia conſequimur et *amiſiſſe* dicemur, 'quod ut conſequi potuimus, aut erogare co-'gimur.'——And, as to coſts, it is well known they are ſo taxed by all courts of juſtice, that the party prevailing never gets all

* L. 33. pr. ff. ad leg. ad Aquil.

that he has diſburſed in perſonal expences and other articles: and hence an Engliſh ſatyriſt † introduces a man ſaying, 'That he had been 'ruined by a decree which he had obtained 'in Chancery, with coſts.' From all which it is evident, that the law cannot give reſtitution; ſo that when a moveable is raviſhed from a man, all that remains with him is a claim at law for a thing of a different nature, *viz.* compenſation by a ſum of money, which, for the moſt part, is inadequate.

Beſides, in a free country, the law is, and muſt be extremely tedious and expenſive. In Turkey, it is believed, the panel might have recovered his gun, or the value of it, in a few hours, and at the expence of a few ſhillings: in this country, it is perfectly clear, that Lord Eglinton might, and in all probability would, have put the panel to the trouble of a litigation for two years, and the expence of L. 200 ſterling, before he got either gun or value: a proceſs might have been brought for it, no doubt, before the ſheriff, and might ſoon have been ended before that judge; but then it was removeable by advocation into the Court of Seſſion, and from that court, by appeal, to the Houſe of Peers; and it is a moderate computation to allow but two years, and L. 200 ſterling for the endurance and ex-

† Swift.

pence

pence of ſuch a courſe of litigation, which, in all probability, Lord Eglinton would have carried through on account of his anxiety for the game-law, and other circumſtances. We have ſeen, not very long ago, all that courſe of litigation run for ſubjects of ſtill leſs valuethan this muſquet. Not many years ago a queſtion about a rolling-ſtone was litigated before the Sheriff, and afterwards removed into the Court of Seſſion by advocation. The fact, it is believed, appeared to be, that a large rough ſtone had been wrongouſly taken by one perſon from the quarry of another, and ſhaped into a rolling-ſtone, and the queſtion was, whether the proprietor of the quarry had an action for the rolling-ſtone, or only the value of the ſtone in its original ſtate; becauſe of the ſpecification by which it had been faſhioned from a block unto a roller; this was the ſubject of a hearing and informations, and the court, it is believed, very juſtly decreed that the plaintiff ſhould recover 5s. and the defendant retain the ſtone.

This cauſe did not go to appeal; but a queſtion about a Highland ox *, not ſo valuable as the panel's gun, was not only obſtinately litigated before the court of Seſſion, but an appeal taken and proſecuted before the houſe of

* 1746. M'Farlane againſt Napier. See Blackſt. Com. b. 3. c. 24. par. 1. n. 9.

Lords, and the plaintiff having only got three guineas as the value of the ox, but no coſts, ſuffered greatly by the victory.

The panel by no means mentions theſe caſes with a view to reflect on the law of this country, which he is ſenſible is as efficacious and expeditious as the law of any free country can be: but the law of every country muſt be defective, and the law of every free country muſt be tedious and expenſive; hence, it is a maxim that *beati poſſidentes*, which is emphatically tranſlated by an old proverb, mentioned by Lord Stair, 'Poſſeſſion is nine 'points of the law:' and therefore, ſuch being the nature of legal remedies, it would be abſurd and unjuſt in the law, as argued above, to ſuperſede the natural right of defence againſt violence, which is a complete and effectual remedy, and oblige perſons attacked to ſubmit to injuries, and betake themſelves to a remedy almoſt always inadequate and incomplete.

What has been argued above will, it is hoped, ſuffice and ſatisfy as to the right of private defence, in order to prevent a robbery or treſpaſs upon property.

The panel comes therefore to the next circumſtance in his favour, under this branch of the argument, viz. That the defence here was lawful, being made in order to preſerve his honour; for the panel holds it to be clear

and

and notorious, and what every man's feelings muſt evince, that the forcibly taking a man's gun from him is a moſt atrocious injury and affront, as it implies and expreſſes the greateſt ſuperiority and contempt on the part of the taker, and the utmoſt meanneſs and puſillanimity on the part of the perſon who ſuffers it to be taken.

The proſecutors in anſwer to this contend, that honour is not a *nomen juris* *.

This is a miſtake, as the panel is adviſed, and all the lawyers which the proſecutors themſelves quote upon other points, are agreed againſt them upon this. Thus Clarus in the place above quoted; 'Idemque 'et multo magis dicendum eſt, quod liceat 'alicui alterum interficere pro defenſione pro-'prii honoris, nam periculum famæ æquipa-'ratur periculo vitæ.' In the ſame way Puffendorff: 'Comme preſque tous les peuples 'du monde mettent l'honneur au même rang 'que la vie, on a la raiſon de ſoutenir que 'chacun peut auſſi le defendre, en tuant 'même celui qui veut le lui ravir.' And in the ſame way Carpzovius: 'Ceſſit quoque 'pœna gladii in homicidio neceſſaria, quod 'non dolo ſed coacte ob vitæ, corporis, *ho-'noris*, facultatumque defenſionem commit-'titur.' For the ſame reaſon, Grotius and

* Informat. p. 12.

Coc-

Cocceius, above-mentioned, hold it lawful to kill in order to avoid a kick or a blow; and ſo likewiſe ſays Hawkins in the paſſage above recited, where many authorities are quoted.

The proſecutors were pleaſed to proceed to obſerve, that it was * 'rather too ludicrous 'to ſay, that a man whoſe former rank in 'life was no other than that of a common 'ſoldier, and who at preſent is an inferior 'officer of exciſe, was in honour called upon 'rather to take away the life of his fellow 'creatures, than yield the poſſeſſion of his 'gun.'

But with ſubmiſſion, the obſervation upon the panel's rank and office in life might have been ſpared; it is of the middling kind, and it did not, nor could not deprive him of the title he had to be treated like a gentleman; that he had ſuch a title is moſt certain; he was the ſon of a gentleman; as well born as any in Scotland. It would be very hard upon the gentlemen of this country, many of whom, though of very ancient and honourable families, have but ſmall eſtates, if their ſons were to be degraded from the rank and conſideration of gentlemen, becauſe their fathers, on account of the *res anguſta domi*, or the expence attending a numerous family,

* Inform. p. 12.

were not able to breed them to the moſt lucrative and honourable employments. He who is born a gentleman, and has not miſbehaved, is entitled to be treated as ſuch, whatever his circumſtances may be. Beliſarius, even when he begged, did not forfeit the character. But whether the panel be a gentleman or not is really of no conſequence; for he is a Britiſh ſubject, and, as ſuch, entitled to reſent and reſiſt every attack accompanied with injury or affront, even from the greateſt lord.

The proſecutors next proceed to argue that the panel's behaviour upon the occaſion was diſhonourable; for that if he had been a man of honour, he ought to have done one of two things; and firſt, they ſay, he ought 'to have 'laid aſide his gun and engaged with the 'Earl upon equal terms.'

This is indeed too ludicrous; for it means, if it means any thing, that the panel ſhould have given up his gun, or allowed it to have been taken by Lord Eglinton or his ſervants, which muſt have been the conſequence of his laying it aſide, and then offered to box Lord Eglinton. Now, ſuppoſing that an offer to box was proper for a man of honour, yet it would have been very unreaſonable to have required the panel to do ſo; for Lord Eglinton was the younger and ſtronger man, ſo that the panel would have been

been no match for him, as he, though naturally a ſtrong man too, is advanced in years, and afflicted with ſeveral infirmities.

* The other alternative which the proſecutors give the panel is, 'He ought to 'have challenged him to ſingle combat, and 'have waited till the Earl was properly 'armed for that purpoſe; but when in place 'of following that courſe (which might 'have been expected from one who pleads 'the point of honour) he pours a loaded 'muſket into the bowels of a man unarmed 'and totally defenceleſs, the action muſt be 'condemned not only as barbarous and cruel, 'but as moſt diſhonourable.'

This argument is purely rhetorical, and, like all the other arguments of the proſecutors, calculated to lay a ſnare for the prejudices of mankind. Had the panel, when Lord Eglinton came firſt up to him and gave him bad names, inſtantly fired upon him, he would have acted very improperly. But the panel did not do ſo: he endeavoured to pacify his Lordſhip with a ſoft anſwer to no purpoſe; he even, when his Lordſhip advanced upon and aſſaulted him, did not fire his piece; he threatened to do ſo in order to intimidate, but he did not execute his threats; he fled from before his Lordſhip; (which

* Inform. p. 12.

by

by the by is more than many lawyers hold he was obliged to do) he retired for 120 yards, till he could retire no more. If he did fire, what made him do ſo?—His fall. It is plain from the circumſtances of the caſe, that he did not fire the piece ſo long as he had the uſe of his limbs or his temper; but when deprived of both theſe, when irritated by a fall which was occaſioned by an unjuſtifiable attack, if he did fire the piece, it was neither diſhonourable nor murder in the eye of the law.

The panel now comes to the laſt circumſtance under this head, viz. That he acted in defence of his life; and this the panel apprehends can admit of no doubt, for it is not diſputed, that, before the panel's piece was fired, Lord Eglinton had threatened to ſhoot him, and ſent his ſervant for his own gun for that purpoſe, and that the ſervant with the gun was come up within two or three yards of Lord Eglinton; after that, either the panel was in *periculo vitæ conſtitutus*, or elſe that expreſſion has no meaning.

It is ſaid for the proſecutors, that Lord Eglinton's gun was not loaded; but how could the panel know or ſuſpect that to be the caſe? Whether it was ſo or not he cannot ſay, but certain it is, he believed, and had all the reaſon in the world to believe, that it was loaded, and that it was ſent for in

order to be uſed for the declared purpoſe for which it was ſent. Upon what principle can it be maintained, that the panel ought to have waited till Lord Eglinton got the gun into his hand, in order that he might be in a capacity to put the panel to death? How would that circumſtance have made any difference? Suppoſe the panel had ſhot him in that ſituation, it might ſtill have been pretended, that Lord Eglinton would not have fired his piece. At that rate the panel muſt have waited till Lord Eglinton fired at him; and if, after that, the panel had killed his Lordſhip, the proſecutors would have had a ſtill better argument againſt him, becauſe, after his Lordſhip's fire was over, it is clear the panel was in no danger of being ſhot.

But the truth is, that it is only when the beginner of the quarrel has killed the perſon attacked, and pleads that what he did amounts to no more than manſlaughter, that it is requiſite, it ſhould appear that parties fought upon equal terms. But when the perſon attacked kills the aggreſſor, it is not incumbent on him to ſhew that they were preciſely on equal terms, it is ſufficient if he ſhew that he was in imminent danger, *ſufficit terror armorum*. * So ſays Gail, and all

* De Pace publica. I. 16. n. 5, et ſeq.

the

the reſt of the doctors; and common ſenſe ſays the ſame thing; nay, even *terror armorum* is not neceſſary, as appears from the paſſages above quoted from Carpzovius and Gomez, and the authorities referred to by them. Carpzovius, to the paſſage above quoted, adds, 'Nec enim paritas armorum in moderamine inculpatæ tutelæ tam exacte et præciſe exigitur pro ut late deducet et probat (here he cites a multitude of authors). Quin imo cum armorum ſimilitudo et æqualitas in æquilibrio civili conſiſtat, cui lex certa dari nequit, potius geometrica quam arithmetica proportione, et ex circumſtantiarum qualitate diligenter inſpecta et perpenſa æſtimanda erit. Ita nimirum ut ſi offenſus abſque validioribus armis quæ in promptu habet, ſaluti ſuæ conſulere queat innoxie, tunc imparia arma deponere et compar telum ſi quod in promptu eſt arripere debeat: At ſi incontinenti, periculo in mora exiſtente, comparari ſtatim par telum nequeat, aut evidens immineat periculum, puta quod quis adeo ſubito invadatur, vel aggreſſor longe robuſtior et fortior ſit, vel invaſus in *magnas anguſtias* fuerit redactus, tunc etiam ARMIS INERMI reſiſtere licebit.'—Does not every word of this apply directly to the panel's caſe; it clearly does; and it is moſt incontrovertible, that the panel was *in periculo vitæ conſtitutus*;

and as the relevancy of this defence is admitted by the profecutors, there can be no difficulty to fuſtain it.

It is ſet forth in the indictment, that the panel fired at the Earl, ſtanding unarmed, within two or three yards of him, and ſmiling at his accidental fall; which laſt circumſtance, it was ſaid, muſt have ſatisfied the panel that his Lordſhip would have done him no hurt.

The panel has not the leaſt recollection of ſeeing a ſmile on the Earl's face that day; on the contrary, it diſcovered all the ſymptoms of the utmoſt wrath and fury; however, if his Lordſhip did ſmile, the ſmile could not be a ſmile of complacence or good humour, it muſt have been a ſmile of triumph and deriſion, which could only tend to irritate and provoke the more.

It is argued for the profecutors on this point *, 'If he was truly apprehenſive that 'bodily harm was intended againſt him, his 'only ſafety lay in keeping up his fire; when 'the gun was diſcharged he became defence-'leſs, and could eaſily be overpowered by 'ſuch ſuperior numbers:' from which they conclude, that his firing the piece proceeded, not from an apprehenſion of danger, but the wicked ſcheme, which 'from the beginning

* Inform. p. 22.

'he

'he appears to have deliberately and firmly 'reſolved, viz. rather to bereave the Earl of 'his life than to part with his gun, upon a 'falſe and groundleſs apprehenſion, that the 'Earl meant to uſe violence in depriving him 'of his gun.'

It is very true, that on diſcharging his piece, the panel became in a great meaſure defenceleſs, and expoſed to the attack of his Lordſhip's ſervants: but from this, all that can be juſtly inferred is, either that the panel was ſo bent on hindering Lord Eglinton to take the gun from him, as that he did not mind hazarding his own life for that purpoſe, or that the panel was ſo agitated by the fall, as to be incapable to reaſon or reflect at all; but it can never be fairly inferred from this, that the panel fired the piece cheifly with a view to take Lord Eglinton's life. The argument that he ſhould not have fired, becauſe upon that he became defenceleſs, is inept and trifling; for, at that rate, he ſhould never have fired, and muſt have ſuffered his gun to be taken from him: by firing his piece the panel did all that man could do to prevent the injuries with which he was threatened; and in fact he did prevent them, he hindered Lord Eglinton to take the gun or to ſhoot him: his ſervants indeed, it is believed, carried off the gun, as the panel has never heard of it ſince, but that he could not help; he

did all that man could do to defend his property, his honour, and his life; and the two laſt he did preſerve.

It was not a wicked ſcheme to reſolve to preſerve his gun, though at the loſs of his aggreſſor's life and his own; but however, it does not appear that he would have carried the matter ſo far had he not been deprived of reflection by the fall; for though it is ſet forth he ſwore he would ſhoot Lord Eglinton if he did not keep off, yet it is admitted he did not do ſo; though his Lordſhip continued to advance upon him, he retired 120 yards, and if he fired, did not fire till he fell. It is a ſtrange allegeance *, that 'it was a falſe 'and groundleſs apprehenſion, that the Earl 'meant to uſe violence in depriving him of 'his gun.' Have neither words nor actions any meaning? did not his Lordſhip demand it again and again? did not he advance upon the panel in order to take it? did not he ſend for his own gun in order to make the panel give up his, either from fear, or by putting him to death? after all this can it be ſaid, that it it was a falſe and groundleſs apprehenſion to ſuppoſe the Earl meant to uſe violence? Such an argument is a mockery of reaſon and of juſtice, and when counſel ſo able as thoſe for the proſecutors, are obliged to reſort to

* Inform. p. 22.

ſuch

ſuch ſhifts, it is a demonſtration they are miſerably pinched.

From what has been above argued, it is hoped it will appear, that, ſuppoſing the panel had committed the homicide charged, he did not commit murder, but only what is called ſlaughter unawares in the law of Moſes, *homicidium in rixa commiſſum* in the civil law, manſlaughter in the law of England, *chaude melle* in the ancient Scottiſh law, and caſual homicide in ſelf-defence in the act 1661.

The panel, perhaps, has not anſwered minutely all the arguments and obſervations that are to be met with in the information for the proſecutors: had he done ſo, this information, which is already very long, muſt have been much longer; but he has anſwered all their capital arguments pointedly; and the principles he has eſtabliſhed, and the authorities he has quoted, will, he is perſuaded, enable every perſon, who conſiders them with attention, to detect the fallacy of any argument or obſervation for the proſecutors, of which he may have omitted to take particular notice. The ſtrange poſition, that a ſevere arbitrary puniſhment ought to be inflicted, even though it ſhould appear that the piece went off by mere accident, merits no anſwer, neither does the fanatic argument founded on a text of the New Teſtament.

The

The panel has only to obſerve further upon the informarion for the proſecutors, that it very improperly quotes the law of England, where the proſecutors think it can be of uſe to them; but when they ſee it makes directly againſt them, it is pretended, that there is no arguing from the law of one country to that of another *.

To this the panel anſwers, that it is not upon the ſtatute law of England, but upon the common law, that he founds. He is adviſed, that it is for him in every point: and that it is clear as ſun-ſhine, if he were to be tried in England, he would not ſuffer death, but would be either altogether acquitted, or at moſt found guilty of manſlaughter only. If ſo, the panel, for his own ſake, and for his country's ſake, hopes that the dictates of the criminal law of England will be liſtened to. It is the law of a wiſe and a free people; it is the law, perhaps, in the world that has been improved by experience and matured by time into perfection; it is the law that governs our brethren, the inhabitants of the ſame iſland, and the ſubjects of the ſame king. What an appearance would it have, if a man ſhould be hanged like a dog in this country, who would be diſmiſſed from the Engliſh bar, either with impunity or a ſlight puniſhment? The panel

* Inform. p. 24.

has

has proved, he knows, he is certain, that the law of England is for him; and if doomed to die here, he, with the rope about his neck, will caſt a wiſhful, though unavailing, look to the South, and lament the day he was born a Scotchman!

But the panel has no reaſon to apprehend ſuch a fate; for he has already ſhewn, that the law of his own country is not ſingularly unjuſt and unmerciful; but, on the contrary, it concurs with the laws of other countries in diſtinguiſhing between murder and manſlaughter, and has put the latter on a better footing than it is even by the law of England, as it exeems it from capital puniſhment, but allows an arbitrary one to be inflicted, if an exceſs has been committed.

The panel, before concluding, muſt take notice of one circumſtance, which was much inſiſted on in the pleadings for the proſecutors, though it has been dropped, and not injudiciouſly, out of their information; he means, the high rank of the deceaſed Lord, whoſe death it was his great misfortune to occaſion.

The panel is far from meaning to maintain levelling principles: he knows the conſtitution of this country, has acknowledged different gradations of rank, and conferred certain privileges upon thoſe who hold the higher place; but then the law has been at much pains to fix

their limits; even the forms of appellation are ſettled, and the order of precedence has been regulated. A man of rank has a juſt title to the privileges the law beſtows, but he cannot go beyond them; and if he claims more, and enforces his claim with violence and injury, the meaneſt ſubject is intitled to reſent and reſiſt.

But the panel is perſuaded, that the rank of the noble deceaſed will make no impreſſion upon any of the honourable perſons who may have occaſion to form an opinion upon his caſe. If it does impreſs any of them, he ought to labour to get quit of ſuch prejudice; and the beſt way of doing ſo is this: let him ſuppoſe, that the panel here was not Mungo Campbell the exciſe officer, but a noble perſon, equal in rank, and in every other reſpect, to the deceaſed: or rather let him ſuppoſe, that it is not Mungo Campbell who is under trial for killing Lord Eglinton, but that it is Lord Eglinton who is under trial for killing Mungo Campbell; and then let him aſk his conſcience, if, in ſuch circumſtances, he could pronounce condemnation? If his conſcience ſays no, or heſitates about the matter, let ſuch perſon have a care how he condemns this panel to die.

All the panel requires of mankind is, that they would ſuppoſe themſelves in his circumſtances,

ſtances, and then aſk themſelves, if they would have given up their gun? The panel has aſked this queſtion at many gentlemen, and the anſwer he always received was, No. After that, let this queſtion be aſked, what then would you have done? Would you have ſhot Lord Eglinton rather than have allowed it to be forcibly taken from you? This is a trying queſtion. The panel has put it to many, and the anſwer he always received was, I do not know what I would have done, but I would not have allowed my gun to have been taken. Men who find that their hearts make the ſame negative or uncertain anſwer, ſhould have a care how they condemn him to die. The putting a man to death by the hands of the executioner is a homicide: if the ſentence be according to law, the homicide is juſtifiable; if it proceed from an error in judgment, it is excuſable; if from partiality or prejudice, it is murder.

This information has drawn out to a great length, but the panel will make no apology on that account; he knows his judges too well to imagine they will grudge time or trouble on ſuch an occaſion. If in the courſe of this long and delicate argument any impropriety of expreſſion has eſcaped, he hopes it will be believed, that no offence was intended, and that ſome allowance will be made

even for the anxiety of those that manage his defence, who think it is the duty of counsel to plead, as it is that of judges to determine, without respect of persons.

In respect whereof, &c.

JO. MACLAURIN.

APPENDIX.

APPENDIX.

THE panel, ſince his information was written, has providentially met with a paper which he thinks of great conſequence. This paper is a printed copy of the indictment, as originally drawn by ſome of the counſel for the proſecutors, the panel ſuppoſes Lord Advocate. In the firſt draught of the indictment, it appears from this copy, that ſeveral facts were admitted or ſet forth, which have been ſuppreſſed in the indictment that has been ſerved upon the panel. The printed copy of the firſt draught of the indictment is as follows: 'Yet true it is and of verity, that you, 'the ſaid Mungo Campbell, have preſumed 'to commit, and are guilty, actor, art or and 'part of the ſaid crime, in ſo far as the de-'ceaſed Alexander Earl of Eglinton, having, 'upon the 24th day of October, in this pre-'ſent year 1769, or upon one or other of the 'days of that month, or of the month of Sep-'tember preceding, or November following, 'gone out from his houſe of Eglinton in the 'county of Ayr, in his coach, to look at ſome 'of his grounds; and being told by one of 'his ſervants, when upon the road from Salt-'coats to Southennan, within the pariſh of 'Ardroſſan and ſaid county of Ayr, that he

'obſerved

'observed two perſons, one of them with a 'gun, at a ſmall diſtance, upon his Lordſhip's 'ground; upon which the Earl, who, by an 'advertiſement in the news-papers, had forbid 'all unqualified perſons to kill game within 'his eſtate, came out of his coach and 'mounted a horſe, which was led by his ſer-'vants, and unarmed, leaving in his coach an 'unloaded gun *with powder and ſhot*, he rode 'towards the two perſons, who in the mean 'time went off the Earl's grounds into the 'adjacent ſands; and he having come near 'to the two perſons, and diſcovered the one 'with the gun to be you, the ſaid Mungo 'Campbell, he accoſted you by ſaying, "Mr. Campbell, I did not expect to have "found you ſo ſoon upon my grounds, after "the promiſe you made me when I laſt "catched you, when you had ſhot a hare;" 'and the Earl having thereupon deſired you 'to deliver your gun to him, you refuſed ſo 'to do; and, upon the Earl's approaching 'towards you, you cocked your gun and 'preſented or pointed it at him; and upon 'the Earl's then ſaying, 'Sir, will you "ſhoot me?' you anſwered, that you would, 'if his Lordſhip did not keep off; to which 'the Earl replied, that if he had his gun he 'could ſhoot pretty well too, or uſed words 'to that import, and deſired a ſervant to 'bring his gun from his coach, which was

'then

' then at ſome diſtance; and the Earl having
' diſmounted and walked towards you, lead-
' ing his horſe in his hand, and without
' arms or offenſive weapons of any kind, you
' retired or ſtepped backwards as he approached,
' and continued to point your gun at him,
' deſiring his Lordſhip again to keep off, or
' by God you would ſhoot him: and a ſer-
' vant near to the Earl having begged of you
' for God's ſake to deliver your gun, you
' again refuſed, ſaying, you had a right
' to carry a gun; to which Lord Eglinton
' anſwered, that you might have right to
' carry a gun, but that you had no right to
' carry a gun upon his eſtate without his li-
' berty; to which you replied, that *you beg-*
' *ged his Lordſhip's pardon*, but ſtill perſiſted in
' refuſing to deliver your gun; and you, by
' ſtriking your foot againſt a ſmall ſtone,
' having fallen upon your back, when retir-
' ing, and keeping your gun pointed at Lord
' Eglinton, as above deſcribed, the muzzle
' of the gun came thereby to be altered in
' the direction from Lord Eglinton, and to be
' pointed near ſtraight upwards; and Lord
' Eglinton, who was only diſtant from you
' two or three yards, having ſtopped or ſtood
' ſtill upon your falling, you, as ſoon as you
' could, recovered yourſelf, and reſting upon
' your arm or elbow, aimed or pointed your
' gun to the ſaid Alexander Earl of Eg-
' linton,

'linton, and wickedly and feloniouſly fired 'it at him ſtanding unarmed, *where he was 'when you fell,* ſmiling at your accidental fall; 'and by the ſhot he was wounded in the 'belly in a dreadful manner, the whole lead-'ſhot in the gun having been thrown into 'his bowels; of which wound the ſaid Alex-'ander Earl of Eglinton died that night 'about 12 o'clock; and you the ſaid Mungo 'Campbell, after perpetrating ſo cruel, 'wicked, and barbarous crime, did immedi-'ately run to one of Lord Eglinton's ſervants, 'who had brought his gun from his coach, 'and who was ſtanding at ſome diſtance, and '*about to have loaded her,* and endeavoured 'to wreſt the gun from him, but was pre-'vented by the aſſiſtance of another ſer-'vant; and when the two ſervants were en-'gaged with you to defend the gun, and en-'deavouring to ſecure you, the Earl, who 'was then ſitting on the ground, called to 'the ſervants to ſecure the man, for he had 'ſhot him, but not to uſe him ill, or uſed 'words to that purpoſe and effect; and, upon 'your being brought near to Lord Eglinton, he 'ſaid to yourſelf, 'Campbell, I would not have 'ſhot you.' And you the ſaid Mungo Camp-'bell, when carrying from the place where 'you committed the foreſaid crime to Salt-'coats, *being aſked if you did not repent what 'you had done, anſwered in ſubſtance, that if it*

'*was to do you would do it again, as you would yield your gun to no perſon; and being aſked, by thoſe who attended you as a guard from Salt-coats to the priſon in Irvine, how you came to ſhoot Lord Eglinton? you gave an account of the matter in ſubſtance as follows: that Lord Eglinton having demanded your gun, which you refuſed, you retired, having your gun cocked, till you fell, when, upon lifting up your head, and ſeeing a gun coming to Lord Eglinton, you had ſhot him, believing, that if he had got the gun, he would have ſhot you; and that it was better to ſhoot than be ſhot.* And the ſaid Alexander Earl of Eglinton, when within two or three hours of his death, in giving an account to John Moore, ſurgeon in Glaſgow (who was called to give what aſſiſtance he could in the way of his profeſſion) of what had paſſed between you and him, did, in ſubſtance ſay, that you, the ſaid Mungo Campbell, did take an aim at him, and ſhoot him wilfully; and which account of the matter was given by the ſaid Alexander Earl of Eglinton with the greateſt calmneſs, *and without the leaſt appearance of rancour or reſentment of what had happened,*' &c.

What is printed in the Italic character was afterwards ſtruck out by the proſecutors, and printed copies of the indictment thrown off without theſe paſſages in them; and it is with

AP ACC CMt
The trial of Mungo Campbell, b
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